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H.R. 1873, REPARATIONS: DOES INCLUSION IN  
FEDERAL ELIGIBILITY CALCULATIONS DESTROY  
THEIR RESTITUTIONARY CHARACTER?

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H.R. 1873, Reparations: Does Inclusion... MORE THE  
HUMAN RESOURCES AND INTERGOVERNMENTAL  
RELATIONS SUBCOMMITTEE  
OF THE  
COMMITTEE ON  
GOVERNMENT OPERATIONS  
HOUSE OF REPRESENTATIVES  
\* ONE HUNDRED THIRD CONGRESS  
FIRST SESSION  
ON  
**H.R. 1873**

TO REQUIRE CERTAIN PAYMENTS MADE TO VICTIMS OF NAZI PERSECUTION TO BE DISREGARDED IN DETERMINING ELIGIBILITY FOR AND THE AMOUNT OF BENEFITS OR SERVICES BASED ON NEED

NOVEMBER 10, 1993

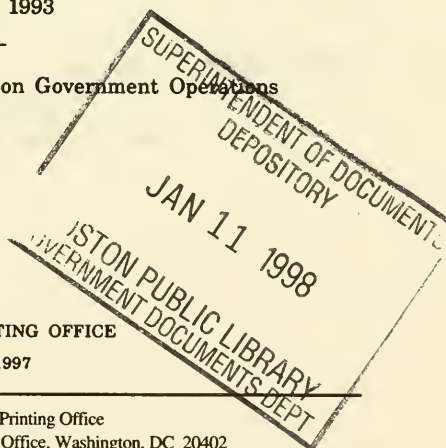
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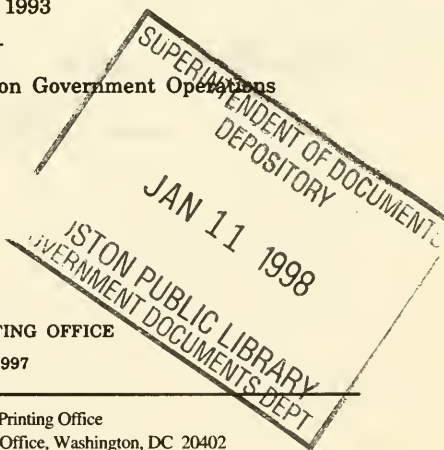
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# **H.R. 1873, REPARATIONS: DOES INCLUSION IN FEDERAL ELIGIBILITY CALCULATIONS DE- STROY THEIR RESTITUTIONARY CHAR- ACTER?**

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**WEDNESDAY, NOVEMBER 10, 1993**

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON HUMAN RESOURCES AND  
INTERGOVERNMENTAL RELATIONS,  
COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, DC.*

The subcommittee met, pursuant to call, at 10:50 a.m., in room 2247, Rayburn House Office Building, Hon. Edolphus Towns (chairman of the subcommittee) presiding.

Present: Representatives Towns, Waxman, Payne, and Portman.

Staff Present: Cherri L. Branson, associate counsel; Martine M. DiCroce, clerk; Martha Morgan, minority professional staff member.

Mr. TOWNS. Committee on Government Operations, Subcommittee on Human Resources and Intergovernmental Relations, will come to order.

This is a hearing on H.R. 1873, Reparations: Does inclusion in Federal eligibility calculations destroy their restitutionary character?

This hearing will examine H.R. 1873 as introduced by my friend from California, Congressman Henry Waxman, which excludes reparation payments paid through foreign governments from eligibility determinations in federally supported need-based programs. Additionally, we will explore the underlying legal and moral philosophy of reparation payments; the treatment of reparation payments in Federal eligibility programs; and the problems faced by reparation payment recipients.

Under Hitler's regime, a campaign which began with eliminating the rights of citizens to participate in government, own property, and pursue professions evolved into the mass extermination of millions of people in the gas chambers of concentration camps. In the final days of World War II, American and Allied troops liberated Europe and stumbled onto the concentration camps. Through barbed wire, they saw half-living human beings, who managed to survive Hitler's final solution.

In the years following the war, the Federal Republic of Germany enacted legislation which provides for restitution for several types of claims, arising out of the Holocaust, including the loss of prop-



erties, possessions, economic advancement and injury to body and health.

But we are not here today to examine the policies of the German Government. Today, we gather to examine the policies of various agencies of the U.S. Government.

It seems that Americans who receive reparations from the German Government and Federal need-based assistance are not treated the same by all agencies of the United States Government. While the Internal Revenue Service has long excluded these payments from income, the Social Security Administration and the Department of Housing and Urban Development have only recently agreed to reconsider previous rulings which counted these payments toward income.

This sort of contradictory and different treatment of various Federal agencies places survivors under unnecessary strain and uncertainty.

Uniform treatment of reparation payments would ensure that elderly survivors receiving reparation and Federal assistance would not undergo uncertainty and protracted legal battles.

At this time I would like to yield to Congressman Waxman, the author of this legislation.

[The prepared statement of Hon. Edolphus Towns and the text of H.R. 1873 follow:]



OPENING STATEMENT OF CONGRESSMAN  
EDOLPHUS TOWNS, CHAIRMAN

COMMITTEE ON GOVERNMENT OPERATIONS  
SUBCOMMITTEE ON HUMAN RESOURCES AND INTERGOVERNMENTAL RELATIONS

HEARING ON H.R. 1873, Reparations: Does Inclusion in Federal  
Eligibility Calculations Destroy Their Restitutionary Character?

Members of the Subcommittee, witnesses and guests, this hearing will examine H.R. 1873, as introduced by Rep. Waxman (D-CA), which excludes reparation payments paid through foreign governments from eligibility determinations in federally supported need-based programs. Additionally, we will explore the underlying legal and moral philosophy of reparation payments; the treatment of reparation payments in federal eligibility calculations and the problems faced by reparation payment recipients.

Pogroms, prejudice and persecution of the European Jewish community had existed in various forms for hundreds of years before the Holocaust. However, the twin objectives of disenfranchisement followed by death arose with Hitler's Nazi regime.

Under Hitler's regime, a campaign which began with eliminating the rights of citizens to participate in government, own property and pursue professions evolved into the mass extermination of millions of people in the gas chambers of concentration camps. In the final days of World War II, American and Allied troops liberated Europe and stumbled onto the concentration camps. Through barbed wire, they saw half-living human beings, who managed to survive Hitler's "final solution".

In the years following the war, the Federal Republic of Germany enacted legislation which provides for restitution for several types of claims, arising out of the Holocaust, including the loss of property, possessions, economic advancement and injury to body and health.

But we are not here today to examine the policies of the German Government. Today we gather to examine the policies of various agencies of the Government of the United States.

It seems that Americans who receive reparations from the German Government and Federal need-based assistance are not treated the same by all agencies. While the Internal Revenue Service has long excluded these payments from income, the Social Security Administration and the Department of Housing and Urban

Development have only recently agreed to reconsider previous rulings which counted these payments toward income.

It seems to me that this sort of contradictory and different treatment by various federal agencies places survivors under unnecessary strain and uncertainty.

The Waxman Bill, H.R. 1873, would require that payments made by foreign governments to victims of the Holocaust who reside in the United States would be uniformly excluded from the calculation of income for the purposes of eligibility determinations in all Federally supported need-based programs. Therefore, under this legislation, government agencies that administer Federally assisted programs such as food stamps, HUD-assisted housing and Medicaid would not require Holocaust survivors to include the amount of reparations payments as a part of their income declaration during application or renewal of benefits.

While exact numbers are not available on the number of Holocaust survivors who receive reparation payments and are recipients of federal need-based assistance, it is certain that this group is decreasing daily.

Uniform treatment of reparation payments, would ensure that elderly survivors receiving reparations and federal assistance would not undergo uncertainty and protracted legal battles.

103D CONGRESS  
1ST SESSION

# H. R. 1873

To require certain payments made to victims of Nazi persecution to be disregarded in determining eligibility for and the amount of benefits or services based on need.

---

## IN THE HOUSE OF REPRESENTATIVES

APRIL 27, 1993

Mr. WAXMAN (for himself, Mr. BERMAN, Mr. FRANK of Massachusetts, Mr. SCHUMER, and Mr. GILMAN) introduced the following bill; which was referred to the Committee on Government Operations

---

## A BILL

To require certain payments made to victims of Nazi persecution to be disregarded in determining eligibility for and the amount of benefits or services based on need.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. CERTAIN PAYMENTS MADE TO VICTIMS OF**  
4 **NAZI PERSECUTION DISREGARDED IN DE-**  
5 **TERMINING ELIGIBILITY FOR AND THE**  
6 **AMOUNT OF NEED-BASED BENEFITS AND**  
7 **SERVICES.**

8 (a) IN GENERAL.—Payments made to individuals be-  
9 cause of their status as victims of Nazi persecution shall

1 be disregarded in determining eligibility for and the  
2 amount of benefits or services to be provided under any  
3 Federal or federally assisted program which provides bene-  
4 fits or services based, in whole or in part, on need.

5 (b) APPLICABILITY.—Subsection (a) shall apply to  
6 determinations made on or after the date of the enactment  
7 of this Act with respect to payments referred to in sub-  
8 section (a) made before, on, or after such date.

9 (c) PROHIBITION AGAINST RECOVERY OF VALUE OF  
10 EXCESSIVE BENEFITS OR SERVICES PROVIDED DUE TO  
11 FAILURE TO TAKE ACCOUNT OF CERTAIN PAYMENTS  
12 MADE TO VICTIMS OF NAZI PERSECUTION.—No officer,  
13 agency, or instrumentality of any government may at-  
14 tempt to recover the value of excessive benefits or services  
15 provided before the date of the enactment of this Act  
16 under any program referred to in subsection (a) by reason  
17 of any failure to take account of payments referred to in  
18 subsection (a).

Mr. WAXMAN. Thank you very much, Mr. Chairman. I want to thank you for holding this hearing and I look forward to having us move this legislation forward.

This legislation would require restitutionary payments made by foreign governments to victims of Nazi persecution to be disregarded in determining eligibility for and the amount of Federal need-based benefits. This is important legislation and deserves the strong support of this subcommittee.

With last spring's opening of the U.S. Holocaust Memorial Museum, our attention has been focused on the unspeakable crimes that were committed during Hitler's regime in Nazi Germany and throughout Europe. Between 1933 and 1945, the government of the Third Reich proceeded stage by stage from the persecution of Jews to the systematic annihilation of large portions of Europe's Jewish population.

In the aftermath of World War II, the postwar German Government and Austrian Government have instituted programs of payments to Holocaust survivors. These payments are not intended to be full and adequate compensation for the Holocaust, as such compensation is impossible. These payments are instead a small gesture to victims who were at the center of perhaps the darkest period in modern history. It is unacceptable for these payments to diminish survivors' eligibility for aid under any Federal program.

The Internal Revenue Service, the Ninth Circuit U.S. Court of Appeals, and the U.S. Congress have all ruled that reparations payments to Holocaust survivors are not to be counted in determining eligibility for certain Federal means-tested programs. By unifying these policies within one bill, and by expanding their applicability to all Federal need-based programs and to all restitutionary payments made to victims of Nazi persecution, individual agencies will no longer have to respond to this issue on a case-by-case basis and the Holocaust survivors will not have to be subjected to unnecessary bureaucracy and maybe even legal action.

Holocaust survivors have already suffered far too much. I urge my colleagues to support this legislation and help enact it promptly through the Congress.

I thank all the witnesses for being here. I look forward to hearing their testimony, and again to you, Mr. Chairman, your calling this hearing, is very much appreciated.

Mr. TOWNS. Also let me thank you for the work that you are doing on this. I think that you need to be commended, and we look forward to working with you to move this legislation along.

[The prepared statement of Hon. Henry A. Waxman follows:]



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**Congress of the United States**  
**House of Representatives**  
**Washington, DC 20515-0529**

**HENRY A. WAXMAN**  
29TH DISTRICT, CALIFORNIA

COMMITTEE:  
ENERGY AND COMMERCE  
CHAIRMAN, SUBCOMMITTEE ON  
HEALTH AND THE ENVIRONMENT  
GOVERNMENT OPERATIONS  
PHILIP M. SCHULIS  
ADMINISTRATIVE ASSISTANT

Statement of Representative Henry A. Waxman  
Human Resources Subcommittee Hearing on H.R. 1873  
November 10, 1993

Thank you, Mr. Chairman. I would like to commend you for holding this hearing on H.R. 1873, legislation to require restitutionary payments made by foreign governments to victims of Nazi persecution to be disregarded in determining eligibility for and the amount of Federal need-based benefits. This is important legislation and deserves the strong support of this subcommittee.

With last spring's opening of the U.S. Holocaust Memorial Museum, our attention has been focused on the unspeakable atrocities that took place during the Hitler regime in Nazi Germany. Between 1933 and 1945, the government of the Third Reich proceeded stage by stage from the persecution of Jews to the systematic annihilation of a huge portion of Europe's Jewish population.

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victims who were at the center of perhaps the darkest period in modern history. It is unacceptable for these payments to diminish survivors' eligibility for aid under any Federal programs.

The Internal Revenue Service, the Ninth Circuit U.S. Court of Appeals, and the U.S. Congress have all ruled that reparations payments to Holocaust survivors are not to be counted in determining eligibility for certain Federal means-tested programs. By unifying these policies within one bill, and by expanding their applicability to all Federal need-based programs and to all restitutionary payments made to victims of Nazi persecution, individual agencies will no longer have to respond to this issue on a case-by-case basis, and Holocaust survivors will not have to be subjected to unnecessary bureaucracy.

Holocaust survivors have already suffered far too much. I urge my colleagues to support this legislation and help me work for its prompt passage by the House.

I would like to thank all of the witnesses for being here today and I look forward to hearing their testimony.



Mr. TOWNS. At this time I would like to call on Mr. Nicolas Retsinas, who is Assistant Secretary of Housing for the U.S. Department of Housing and Urban Development. Mr. Retsinas.

Let me say to all the witnesses that we would like for you to summarize your statements within 5 minutes, and this will allow the committee to raise questions. Let me also indicate that your entire statements will be included in the record.

**STATEMENT OF NICK RETSINAS, ASSISTANT SECRETARY FOR HOUSING, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

Mr. RETSINAS. Thank you, Mr. Chairman and Congressman Waxman and members of the committee. Thank you for this opportunity.

I have a brief statement to go over and I will keep it to the 5 minutes, Mr. Chairman, and then a brief comment.

This is an important bill. It is important, particularly important, because while some legislation may on the surface appear to impact very few people, that does not make it less important. I think this is an example of a bill that addresses an important policy issue that is worth addressing.

Mr. Chairman, we appreciate the opportunity to come here today to discuss payments made to victims of Nazi persecution in determining eligibility and how that payment is treated by the Department of Housing and Urban Development.

We at the Department and this administration are sensitive to the suffering and loss of Holocaust survivors and the unique condition in history. The payments instituted by the German and Austrian Governments are intended as recognition and as a mere token gesture to individuals who were persecuted because of this situation in that time.

Last spring, when Secretary Cisneros joined the Department and became Secretary, Senator DeConcini brought to the Secretary's attention the case of an individual who lives in HUD-assisted housing in Phoenix, AZ, who was receiving reparation payments from the German Government. During a routine examination by our staff, our staff found that this income was being received by this tenant. The result of the staff review was an increase in her share of the rent and a repayment schedule to cover past rent. This is because, as you know, many of our rents are determined as a percentage of income.

After reviewing the case, Secretary Cisneros provided her with the relief she sought and, more importantly, ordered a revision in the regulations governing income determinations.

I am here to tell you today, to reaffirm that the Department is taking conclusive steps to ensure that these payments are not included as income for our need-based programs.

As you know, HUD provides means-tested housing assistance to eligible lower-income families under a variety of HUD housing programs. In each of these programs, to ensure compatibility with congressional policies, HUD takes family income into account in determining initial eligibility and the level of benefits provided. We periodically reexamine a tenant's family income to determine continued level of benefits and continued eligibility.

Statutes governing these programs state that income is defined as being from all sources based on criteria prescribed by the Secretary. Within this guideline, the department publishes regulations on exactly what is to be included as income and what is not considered income for these purposes. To repeat: Exactly how income is defined is a matter of policy.

Mr. Chairman, members of the committee, as I indicated earlier this spring, HUD changed its policy. Let me first go over what the policy was and then I will be clear on what the policy is today.

In general, income means wages, business income, Social Security payments, retirement benefits, and unearned income, such as interest and dividends. HUD has also defined what is not income, such as reimbursements for medical payments, insurance claims, one-time gifts, and payments for foster children.

In establishing criteria for calculating income, the Department has provided that the full amount of periodic payments received by program applicants and participants must be considered income. Since the restitution payments from foreign governments in connection with the Holocaust are made periodically, most often on a monthly basis, these payments were included in family income.

We understand that the reason the payments are being made on a periodic basis and not as a lump sum was a policy decision and a convenience for the foreign governments involved.

In reviewing this policy, the Department has concluded that Holocaust restitution payments should not, and I would underline not, be considered a periodic payment in the same way as other periodic payments. As a matter of agency discretion, we have determined that the payments should not be included as income.

We have codified this policy in our regulations. Effective April 23 of this year, the Department changed its regulations to specifically say that reparation payments will not be included in calculations for determining eligibility for federally subsidized housing or in determining the amount of rental assistance provided.

There have been a number of audits which have identified tenants who have not included these payments in their income for eligibility and benefits determinations. Many have been cited for failure to include all their income and have been requested to repay the excess rental assistance.

This regulation, however, provides that any assisted housing residents who in the past did not include reparation payments in their gross reported income and were asked to repay their assistance will be excused from further repayment on or after the effect regulation's date.

We completely understand and appreciate the intent of H.R. 1873 to require these payments to be disregarded in determining eligibility for need-based Federal assistance. H.R. 1873 is entirely consistent with the recent actions of the administration and the Department. The concerns Mr. Waxman raises in his proposal have been recognized by the Department. We have changed our regulation so that need-based housing assistance programs will no longer consider the reparation payments as part of income.

That concludes my prepared testimony, Mr. Chairman. I will be happy to answer any questions.

[The prepared statement of Mr. Retsinas follows:]

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

Thank you, Mr. Chairman, for inviting me here today to discuss payments made to victims of Nazi persecution in determining eligibility and how that payment is treated for purposes of HUD's rental housing assistance based on need.

We at HUD are sensitive to the suffering and loss of holocaust survivors and their unique condition in history. The payments instituted by the German and Austrian governments are intended as recognition and a token gesture to individuals who were persecuted because of anti-Nazi persuasion, or for reasons of race, faith, or philosophy of life, which resulted in injury, death, or deprivation of their personal freedom and civil rights.

Last spring, Senator DeConcini brought to Secretary Cisneros' attention the case of Fanny Schlomowitz. Mrs. Schlomowitz lives in HUD assisted housing in Phoenix, Arizona and receives reparation payments from the German government. During a routine examination of tenant income reports, it was found that the payments were not reported as income. The result was an increase in her share of the rent and a repayment schedule to cover the past rent. After reviewing the case, Secretary Cisneros provided Mrs. Schlomowitz with the relief she sought and ordered a revision in the regulations governing income determinations. The Department has taken steps to ensure that these payments are not included as income for our need based programs.

Definition of Income:

HUD provides means tested housing assistance to eligible lower income families under the Rent Supplement, Section 236, Section 221(d)(3) BMIR, Section 8, and Public and Indian Housing programs. In each of these programs, HUD takes family income into account in determining initial eligibility and the level of benefits provided. HUD also periodically reexamines a tenant's family income to determine continued level of benefits.

Statutes governing these programs state that income is defined as being from all sources based on criteria prescribed by the Secretary. Within this broad guideline, HUD publishes regulations on exactly what is to be included as income and what is not considered income for these purposes. Exactly how income is defined is a matter of policy.

Change in HUD Policy:

HUD has changed its policy. Let me first explain what HUD policy has been. In general, income means wages, business income, social security payments, retirement benefits and unearned income such as interest payments and dividends. HUD has defined what is not income as well, such as reimbursements for medical payments, insurance claims, one time gifts, and payments for foster children.

In establishing criteria for calculating income, HUD has provided that the full amount of periodic payments received by program applicants and participants must be considered income. Since the restitution payments from foreign governments in connection with the holocaust are made periodically (normally on a monthly basis), these payments have been included in family income.

We understand that the reason payments are being made on a periodic basis and not as a lump sum was for the convenience of the foreign governments involved.

In reviewing the policy, HUD has concluded that holocaust restitution payments should not be considered a periodic payment in the same way as other periodic payments. As a matter of agency discretion, we have determined that the payments should not be included as income.

#### The Regulation Change:

Effective April 23, 1993, HUD changed its regulations to specifically say that reparation payments will not be included in calculations for determining eligibility for federally subsidized housing or for the amount of rental assistance provided.

There have been a number of audits which have identified tenants who have not included these payments in their income for eligibility and benefits determinations. Many, as in the case of Fanny Schlomowitz, have been cited for failure to include all their income and have been requested to repay the excess rental assistance.

The regulation provides that any assisted housing residents who in the past did not include reparation payments in their gross reported income and were asked to repay assistance will be excused from further repayment on or after the regulation's effective date.

#### H.R. 1873:

HUD understands and appreciates the intent of H.R. 1873 to require these payments to be disregarded in determining eligibility for need based federal assistance. H.R. 1873 is consistent with HUD policy. The concerns Mr. Waxman raises in his proposal have been recognized by HUD. We have changed our regulations so that need based housing assistance programs will no longer consider the reparation payments as part of income.

This concludes my prepared testimony. I will be happy to answer any questions the committee might have.



Mr. TOWNS. Let me thank you for your testimony and just indicate that we have a vote on the floor and I know you have also some time constraints. So we will try to finish with you before going to vote and then take a 10-minute recess.

Mr. RETSINAS. Thank you, Mr. Chairman.

Mr. TOWNS. Let me just say that concern would be that the decision to exclude payments is an administrative decision, but with an administrative stroke of a pen, this could be stopped.

So I think legislative action will actually help you to be able to continue to exclude payments from housing assistance calculations. Because it could stop tomorrow.

Mr. RETSINAS. It would give us—you are absolutely right. I am not an attorney, Mr. Chairman, but it would seem to me to give a further foundation or legal basis for this action. It is the right action.

I want you to be ensured we have no intent of changing our actions but could in fact further codify, if you will, or provide that foundation. It could, indeed, serve that purpose.

Mr. TOWNS. Let me yield to the gentleman who is the sponsor of this legislation, Congressman Waxman.

Mr. WAXMAN. Thank you, Mr. Chairman.

I appreciate your testimony and I commend you for the administrative decision that you are taking. I think that this legislation would make clear to all agencies that this is the policy we want to be in effect.

We do have a case in an article of February of this year. Holocaust survivor 84 learns she will not have to vacate her home, but at one point she was told a HUD spokesman said counting such payments when setting rent is required by Federal law, and said any change would require action by the Congress.

We have tried to change this as the issues come up in other statutes, court cases have ruled that to enact this policy through their actions in a case-by-case basis. I think we should just make clear the policy throughout the country.

Thank you for being here.

Mr. TOWNS. Thank you very much for your testimony and of course, Mr. Chairman, I look forward to working with you. Thank you.

Mr. RETSINAS. Thank you, too, Mr. Waxman.

Mr. TOWNS. Ten minute recess and we will be right back after the vote.

[Brief recess.]

Mr. TOWNS. The members of the next panel are Mr. Ben Meed, president of the American Gathering of Holocaust Survivors, and Mr. Norbert Wollheim, who is the treasurer of the American Gathering of Holocaust Survivors.

The American Gathering represents one of the largest groups dedicated to protecting the interests of survivors. It is my understanding that both of the witnesses are themselves survivors.

I look forward to hearing your testimony, and if you would keep in mind that your entire statement will be included in the record and if you could just summarize. Why don't you begin, Mr. Meed.

**STATEMENTS OF BENJAMIN MEED, PRESIDENT, AMERICAN GATHERING OF HOLOCAUST SURVIVORS; AND NORBERT WOLLHEIM, TREASURER, AMERICAN GATHERING OF HOLOCAUST SURVIVORS**

Mr. MEED. Thank you, Chairman Towns, distinguished members of the subcommittee, the legislation introduced by Representative Waxman is critically important for Holocaust survivors. Therefore, I want to thank you for focusing on this issue and for inviting us, as president of the American Gathering of the Jewish Holocaust Survivors, and I might add also that I am the chairman of the Holocaust committee of the museum in Washington, to testify at this hearing.

The American Gathering, as you already mentioned, is an organization with a membership of over 80,000, representing survivors throughout the Nation; people who after the war and after coming to this country picking themselves up from the very pit of hell, to rebuild their lives and raise new families in this great country. Instead of seeking vengeance, they chose to pursue productive lives with dignity.

The American Gathering provides a network for survivors to be in touch with each other and sponsors projects geared toward Holocaust remembrance—through commemoration, documentation, and education.

I am leaving the members of the subcommittee with two examples of our work of the American Gathering. The book, "The National Registry of Jewish Holocaust Survivors," published in cooperation with the U.S. Holocaust Memorial Museum, documents the lives of the survivors who came to the United States after the war. The records compiled by the American Gathering for the National Registry have been transferred now to the museum and the National Registry is now open for the public on the fifth floor of the museum.

I also leave you with a list of teachers who have been participating now in our summer fellowship program, Jews and non-Jews, the majority non-Jews in Poland and Israel. This program is an intensive 3½-week learning experience for teachers from throughout the country, 41 States, educates its participants about the history of the Holocaust, offers the teaching methodology for that subject. In the 9-year history of the program, we almost have 400 teachers from 41 States, Washington, DC, and the Virgin Islands, who collectively reach now almost 100,000 students annually.

It is now some 50 years since the world turned its back to Jews, as the Nazis tried to wipe out an entire people, an entire culture from the face of the Earth. Now, 50 years after the Holocaust, most survivors are at the last stages of their lives. Holocaust survivors are no different than other aging people: often lonely, afflicted by the problems of the elderly; anxiously awaiting the next call from a friend or from a daughter or son.

But in a significant respect, Holocaust survivors are unlike anyone else. They personally witnessed the unspeakable cruelty. And they personally suffered profound losses through being tortured; through the damage of their mental and physical functions; through the persecution and murder of relatives; through the torment of not knowing what happened to their children and their

parents, their brothers and sisters. But in spite of what was done to them, instead of seeking, as I said, vengeance, survivors devoted the remainder of their lives warning humankind about the fatal dangers of intolerance and indifference.

There is no suitable payment for, or words cannot sufficiently describe, such suffering. Many survivors are in a desperate situation and need extensive help—financial help and psychological help very often. And as a practical matter, the foreign payments do help many poor survivors. But, in fact, the amounts that have been, are being, and will be paid in reparations are pathetically low. Such reparations are more symbolic gestures of the guilt and responsibility of the nations making the payments than adequate compensation for the irreparable damage that was done to the survivors or to the victims.

The reparations that are being paid to some Holocaust survivors are for the injury, pain, and suffering they sustained during the Nazi era. It is unthinkable that such reparations—a pitiful and entirely unsuccessful attempt to compensate survivors for the damage done to them—be counted as a regular income or assets which affect any Holocaust survivor's eligibility for Federal aid.

In conclusion, most survivors, as you know, are well into their senior years. Within a handful of years, one-half of our population of the survivors will be gone. And I repeat within a handful of years. Therefore, I not only strongly urge you on behalf of the American Gathering the passage of the proposed legislation because it is proper, I plead on behalf of the Holocaust survivors for swift congressional action before it is too late to make a difference for those who would be affected by it.

Again, I would like to thank you by providing us with the opportunity to participate on behalf of our fellow survivors. Thank you, Mr. Chairman.

Mr. Chairman and Mr. Waxman, I would like to present to you the book of the Holocaust survivors.

Mr. TOWNS. Thank you.

[The prepared statement of Mr. Meed follows:]





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## American Gathering/Federation of Jewish Holocaust Survivors

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### HUMAN RESOURCES AND INTERGOVERNMENTAL RELATIONS SUBCOMMITTEE HEARING ON H.R. 1873:

"Reparations: Does Inclusion in Federal Eligibility  
Calculations Destroy Their Restitutionary Character?"

Wednesday, November 10, 1993; 10:00 a.m.  
Room 2247, Rayburn House Office Building  
Testimony of Benjamin Meed

Chairman Towns, distinguished members of the subcommittee; the legislation introduced by Representative Waxman is critically important for Holocaust survivors.

Therefore, I want to thank you for focussing on this issue and for inviting me, the president of the American Gathering of Jewish Holocaust Survivors, to testify at this hearing. The American Gathering, an organization with a membership of 80,000, represents survivors of the Holocaust nationwide -- people who, after picking themselves up from the very pit of hell, rebuilt their lives and raised new families in this great country. Instead of seeking vengeance, they chose to pursue productive lives with dignity.

The American Gathering provides a network for survivors to be in touch with each other and sponsors projects geared toward Holocaust remembrance -- through commemoration, documentation and education. I am leaving the members of the subcommittee with two examples of the work of the American Gathering. The book, The National Registry of Jewish Holocaust Survivors, published in cooperation with the U.S. Holocaust Memorial Museum, documents the lives of survivors who came to the United States after the war. The records compiled by the American Gathering for the National Registry have been transferred to the museum and the National Registry is now open to the public on the fifth floor of the museum.

I also leave you with a list of the teachers who have participated in our Summer Fellowship Program in Poland and Israel. This program, an intensive three-and-a-half week learning experience for teachers -- Jew and non-Jew alike -- from throughout the country, educates its participants about

the history of the Holocaust and offers a teaching methodology for the subject. In its nine-year history, the program has trained almost 400 teachers (from 41 states, Washington, D.C. and the Virgin Islands) who, collectively, reach almost 100,000 students annually.

It is now some fifty years since the world turned its back to Jews, as the Nazis tried to wipe out an entire people and culture from the face of the earth. Now, fifty years after the Holocaust, most survivors are in the last stages of their lives. Holocaust survivors are no different than other aging people: often lonely; afflicted by the problems of the elderly; anxiously awaiting the next call from a friend, from a daughter, or son.

But in a significant respect, Holocaust survivors are unlike anyone else. They, personally, witnessed unspeakable cruelty. And they, personally, suffered profound losses -- through being tortured; through damage to mental and physical functions; through the persecution and murder of relatives; through the torment of not knowing what happened to their children, their parents, and their brothers and sisters. But, in spite of what was done to them, instead of seeking vengeance, survivors devoted the remainder of their lives warning humankind about the fatal dangers of intolerance and indifference.

There is no suitable payment for, or words sufficient to describe, such suffering. Many survivors are in a desperate situation and need extensive help -- financial, psychological and more. And as a practical matter, the foreign payments do help many poor survivors. But in fact, the amounts that have been, are being -- and will be -- paid in reparations are pathetically low. Such reparations are more symbolic gestures of the guilt and responsibility of the nations making the payments, than adequate compensation for the irreparable damage that was done.

The reparations that are being paid to some Holocaust survivors are for the injury, pain and suffering they sustained during the Nazi era. It is unthinkable that such reparations -- a pitiful and entirely unsuccessful attempt to compensate survivors for the damage done to them -- be counted as regular income or assets which effect any Holocaust survivor's eligibility for federal aid.

In conclusion, most survivors, as you know, are well into their senior years. Within a handful of years, one-half of the population of survivors will be gone. Therefore, I not only strongly urge the passage of this proposed legislation because it is proper; I plead for swift congressional action, before it is too late to make a difference for those who would be affected by it.

Mr. TOWNS. Mr. Wollheim.

Mr. WOLLHEIM. Thank you, Mr. Chairman.

My name is Norbert Wollheim. I am the treasurer, as you mentioned, of the American Gathering of the Jewish Holocaust Survivors. I am a survivor of the death camp of Auschwitz and of the concentration camp Sachsenhausen in Iranboke. At the same time, may I add that I owe my life and my liberty to the American Army which liberated me on the morning of May 3, 1945, in northern Germany. So it is not without emotion that I come before you as an American citizen today and as a spokesman for the affairs of Jewish Holocaust survivors.

In historical evaluation, the remark may be appropriate that within our generation the Congress of the United States has dealt twice with the destiny and the interests of the survivors of the Nazi onslaught on humanity. The first time when the DP bill was passed in the 1940's and now by introducing this bill, 1873, on April 27, 1993, to alleviate the hardship for survivors of the Nazi regime who are recipients of Federal need-based benefits.

Under the DP bill, thousands of survivors, my friends, Meed and myself amongst them, became eligible to enter the United States outside of the quota system, which, unfortunately, had barred before untold asylum seekers looking for a safe haven desperately.

I am happy to state that America was good to us and enabled us to establish new homes, to build new families, and to bring a new generation into this world.

Mr. Chairman, it is fair to say that this post-Nazi regime immigration into the United States was all in all a great success in all respects, and that our fellow newcomers have written a unique chapter of human dimension in the United States. Most certainly, not all of them were successful, due to heavy mental burden of their tragic past, due to the debilitating sickness, or due to unfavorable living conditions they were not able to master. Here the needy of our fellow survivors for whom this bill presently under your consideration has been written.

We express our deep gratitude to have done so. We most certainly fully support its purpose and the good intentions which gave you cause to write this bill.

Mr. Chairman, soon after the defeat of the evil Nazi empire, brought about last not least by the heroic engagement of the American forces, concerted efforts were made to let the countries from which the Nazi scourge had originated, Germany especially, to pay for the crimes perpetrated in the name of the government. These efforts were tedious and their results not always to our satisfaction.

I happen to know it from personal experience, because I was involved in Germany in many negotiations with German officials about indemnification for the unspeakable crimes perpetrated on us. There is no proper indemnification for these atrocious crimes, and, therefore, I feel duty bound to emphasize again and again that no payments whatsoever will ever be able to blot out of our memories and can eradicate the physical and psychological aftermath of our ghastly experiences as Nazi concentration camp inmates.

Different categories of indemnification payments to Nazi victims were promulgated in the 1940's and 1950's, in Germany especially. The greatest group of beneficiaries under the laws of the Federal

Republic of Germany are at present victims with serious and life-long damage to their health. The monthly award for that damage on a minimum basis amounts to approximately \$375.

To my regret, I cannot present the actual figures of recipients in the United States right now, but the number of those receiving presently Germany indemnification payments who at the same time have made claims under SSI or for federally subsidized housing in care estimate is rather small and without weighty fiscal consequences.

As Congressman Waxman has pointed out in his letter to the Members of the Congress on April 26, 1993, the question of taxation of the indemnification payments from Germany and Austria has been dealt with to the satisfaction of the beneficiaries of these payments at a rather early stage. In 1956, the Internal Revenue ruling 56-518 was promulgated for payments from Germany, and then in 1958 followed by Internal Revenue ruling 58-370 for payments from Austria, stipulating clearly that the benefits granted under the indemnification laws of Germany and Austria are not considered income under the tax laws of the United States.

Thus, the Internal Revenue Service very rightly took the position that indemnification payments made to Nazi regime victims were made for pain and suffering and could, therefore, not be considered earned or investment income. That was, in my humble opinion, good law because an aspect had entered this decision which had important value for the survivors community; namely, the fact that moral considerations exceed fiscal interest and that the yardstick for moral considerations have to be applied in special situations.

This was a special situation since the German authorities in recognition of their liability toward the survivors expected the recipients of their payments to enjoy them fully and not to be curtailed directly or indirectly, for people in social needs, especially.

To our regret, in the cases of Mrs. Fanny Schlomowitz of Phoenix, AZ, and Ms. Grunfeder, the agencies implementing the policies of the U.S. Department of Housing and Urban Development and the SSI program, respectively, did not feel bound by the highest principles guiding the Internal Revenue policy.

Luckily, and we recognize this with deep gratitude, the intervention by Senator DeConcini in the Schlomowitz case and the ruling of the Ninth Circuit U.S. Court of Appeals in the Grunfeder case brought relief and saved the former Nazi persecutee from further hardship and aggravation in their unfortunate social situation.

Mr. Chairman, bill H.R. 1873 will, when passed and signed, become an important contribution to bring mental peace to our fellow survivors. When it hopefully becomes the law of the land, it will ascertain that they can fully enjoy the small benefits granted them as Nazi Holocaust survivors. Furthermore, it will bring about uniformity in this matter.

For these endeavors, we express again our gratitude and our thanks and for having taken the interest of needy Holocaust survivors to your heart.

In closing, permit me this rather technical remark. In the introduction to this bill, the wording "to require certain payments made to victims of Nazi persecution" is being used. In my humble opinion, the word "certain" could easily create misunderstandings and



might be open to ambiguous interpretations. Thus, I would most respectfully suggest to substitute this opening language to the bill with the operating language of No. 8(a) in general, which reads, "payments made to individuals because of their status as victims of Nazi persecution."

Thanks again for your initiative and your attention. It will regulate and clarify once and for all a situation that has brought anguish and concern to many who just want to live out the last years of a burdensome and painful life in peace and tranquility. Thank you.

Mr. TOWNS. Let me thank you, thank both of you for your very moving testimony, and also to thank you for the work that you are doing with the American Gathering. I think that we appreciate that as well.

In your testimony you indicated the fact that most of the people were elderly. Do you believe that this kind of uncertainty with elderly folks creates an additional kind of hardship, the uncertainty of not knowing?

Mr. WOLLHEIM. Definitely you have—I mean there is a whole medical history on that, because do not forget that in 1945, when our people were liberated, let's say even when they were 20, now it is almost 55 years later, and after having gone through what they have gone through, some of them have lost their companion, some are suffering from delayed damage, psychologically especially. Advancing age adds to their trial and tribulations.

Mr. TOWNS. Let me ask this. Do you believe the numbers of survivors who apply for Federal assistance will increase if we come up with uniformity in treatment throughout the Federal Government? Do you think there will be more people applying?

Mr. WOLLHEIM. I think that actually the number of eligible claimants is diminishing day by day almost. My friend Meed and I, we unfortunately in these days have to go very often to funerals of our fellow survivors because they have reached that age where they cannot, they have reached the end of their lives.

Mr. MEED. The reason I presented to you the book is for the commendation also. I would say that the average age now of the Holocaust survivor is, the majority, over 70 years old. I hope they are going to live long, but unfortunately, as you heard, we are attending more funerals than other celebrations.

The reason we mark or bring it out, the Holocaust is a unique situation. It is nothing to be compared to anything else and I think there are suffering from other people and they should be eligible for the help. But Holocaust survivors are just coincidentally alive. As my colleague told you about being liberated by the U.S. Army or other Allied forces, if the U.S. Army or the other Allied forces would have reached us 6 months later, there would be no Holocaust survivors at all. All of us would be wiped out.

And we underline this, that this is a question of not more than 5 or 6 years that the majority of the survivors, a large portion of them, will be gone. That is why it is important to help now.

Mr. TOWNS. Right. Thank you very much. Again, may I say thank you for your testimony and at this time I would like to yield to Congressman Portman.

Mr. PORTMAN. Thank you, Mr. Chairman, and thank you for holding this hearing. I commend you for bringing focus to this issue as you have on other issues, and Congressman Waxman, commend you also for initiating this process and promoting this legislation.

I think that your statement that the mental health of Holocaust survivors would be greatly improved should there be this kind of standardization is very compelling to me. My questions really go to the fiscal impact. I think you have answered that in a general way and I know we have some more specific information already.

But, if there could be some data developed along that line, it would be helpful. It seems to me this is a long overdue standardization and it is something that the Congress, this subcommittee, and the full committee in the Congress should support. Thank you for coming today.

Mr. WOLLHEIM. Thank you.

Mr. MEED. Thank you.

Mr. TOWNS. Thank you, Congressman Portman. Now yield to Congressman Waxman.

Mr. WAXMAN. Thank you, Mr. Chairman. Your statements were right on point. There is nothing I could ask you to add to the record in any way. I think what you have said is very powerful and very compelling and I thank you for being here today.

Mr. TOWNS. Thank you. Yield to Congressman Payne.

Mr. PAYNE. Thank you very much. Sorry I missed most of the testimony, but I did want to say several statements that I had that let me commend you, Mr. Chairman, for calling this very important hearing. Also like to extend my regards to the witnesses and I did hear part of your testimony.

We all know the story of the European Jewish Holocaust. We all know about the legal disenfranchisement of the European Jewish community and finally about the extermination of 12 million Jews during this deplorable and dismal period in our history.

It is a history that people of African ancestry have an intimate knowledge of. Untold millions of Africans lost their lives making the Middle Passage from Africa to the New World. Millions of Jews were sent to concentration camps where starvation, mutilation, and disease were the norm.

American and Allied forces went through the camps, disbelieving that anyone were capable of implementing a policy of genocide as they saw it. Demand for reparations from the German Government followed the revelations of the Jewish Holocaust.

Subsequent to negotiations between the German Government and Israel and the Conference of Jewish Material Claims Against Germany for a resolution of individual claims, the protocol for restitution, known as the German Restitution Act, was signed on September 10, 1952.

The issue before us today is whether or not the payments of reparation from the German Government should be calculated as income when considering eligibility for need-based programs, such as SSI payments and HUD subsidies. Considering that most of the citizens that receive reparations from the German Government are on fixed incomes and are dependent on Federal assistance for their daily basic survival, a policy of calculating payments as part of annual income could have a particularly devastating effect should

their eligibility for Federal assistance be jeopardized, as you brought out.

The United States Government does not count the reparations made by our Government to Americans of Japanese descent for the internment of Japanese-Americans during World War II. This policy compromises the intent and integrity of reparations.

In New Jersey, we are facing a similar situation, although I do not compare the two with regard to the Holocaust, but we have a problem with Homestead Housing Rebates, where progressive rebates paid in property taxes are paid to residents and are counted as income in adjusted annual income considerations.

About a year ago, I introduced legislation to restore the integrity of the Homestead Rebate Act, H.R. 735, called the Homestead Rebate Exemption Act. So I think that the reason I raise those particular points in that I clearly see the problem here.

I wholeheartedly support the position that you take. I think it is unconscionable that the Government would even consider the income as a part of eligibility, and I lend my wholehearted support to this particular problem.

Thank you, Mr. Chairman.

Mr. MEED. Thank you.

Mr. WOLLHEIM. Thank you.

Mr. TOWNS. Thank you very much, Congressman Payne.

[The prepared statement of Hon. Donald Payne follows:]



## 1

**Good Morning. I would like to commend the chairman for his leadership in calling this very important hearing this morning. I would also like to extend my regards to the panel of witnesses who have agreed to provide us with their testimony.**

**We all know the story of the European Jewish Holocaust.**

## 2

**We all know about the legal disenfranchisement of the European Jewish community and finally about the extermination of 12 million Jews during this deplorable and dismal period in our history. It is a history that people of African ancestry have an intimate knowledge of. Untold millions of Africans lost their lives making the Middle Passage from Africa to the New World. Millions of Jews were sent to concentration camps where starvation, mutilation and disease were the norm.**

## 3

**American and Allied forces went through the camps, disbelieving that anyone were capable of implementing a policy of genocide. Demands for reparations from the German government followed the revelations of the Jewish Holocaust.**

**Subsequent to negotiations between the German government and Israel and the Conference of Jewish Material Claims Against Germany for a resolution of individual claims.**

## 4

**The protocol for restitution, known as the German Restitution Act was signed on September 10, 1952.**

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## 5

Considering that most of the citizens that receive reparations from the German government are on a fixed income and are dependent on federal assistance for their basic daily survival, a policy of calculating payments as part of annual income could have a particularly devastating effect should their eligibility for federal assistance be jeopardized.

## 6

**The U.S. government does not count the reparations made by our government to Americans of Japanese descent for the internment of Japanese Americans during World War II, this policy compromises the intent and the integrity of reparations.**

**In New Jersey, we are facing a similar situation, although I do not compare the two, with regard to Homestead Housing Rebates, where progressive rebates paid in property taxes are paid to residents and are counted as income in adjusted annual income considerations. I introduced legislation to restore the integrity of the homestead rebate act, H.R. 735, the Homestead Rebate Exemption Act.**



## 8

**Mr. Chairman, I again commend you for your leadership on this issue and I look forward to testimony of our witnesses.**

Mr. PAYNE. And let me thank both of you for your testimony again and look forward to working with the Chair, Chairman Waxman to see if we cannot move this along. And thank you for the work you are doing. Thank you.

Mr. TOWNS. At this time I call Mr. Saul Kagan, executive director of the Conference on Jewish Material Claims against Germany, the claims conference of the organization principally responsible for negotiating and overseeing the implementation of the reparation agreement with the German Government.

I call on Mr. Michael Feuer, executive director of the Bet Tzedek Legal Services, House of Justice. The House of Justice provides legal services for Holocaust survivors in various areas.

Let me thank both of you for coming today to testify before the committee.

Mr. Kagan, you may start first.

**STATEMENTS OF SAUL KAGAN, EXECUTIVE DIRECTOR, CONFERENCE ON JEWISH MATERIAL CLAIMS; AND MICHAEL FEUER, BET TZEDEK LEGAL SERVICES**

Mr. KAGAN. Mr. Chairman and Congressman Waxman, Congressman Portman, Congressman Payne, thank you for the opportunity to join my colleagues and friends in expressing the support of the Conference on Jewish Material Claims for the bill introduced by Congressman Waxman, H.R. 1873. We are meeting, I know accidental, but on date which has special meaning and significance to the survivors of the Holocaust. Fifty-five years ago the synagogues of Germany and Austria were set on fire. The pogrom, which became known under the term of Krstel Nacht for short, or the night of the broken glass, is something that has embedded in all of us in the past, in the present, and for the future. The symbol of the brutality and atrocity which was a prelude to the greater atrocity which came under the heading and the label of "final solution."

You just heard very briefly the testimony of two survivors of this final solution of the attempt to exterminate an entire people. I once attempted to explain to some of my non-Jewish friends what the loss of one-third of a people within a period of less than 5 years could mean, and I said to him, I said, imagine that suddenly within 5 years 80 million Americans would be annihilated. I think this is about as close as I could come in an attempt to convey in very few words what it all means, and we will deal with the consequences of it not only since the liberation but probably for generations to come.

I want to just very briefly refer to the role of the claims conference. Congressman Payne has already mentioned the agreements of 1952 which were the first agreements under which the basic compensation and restitution legislation has been agreed upon with the first German Federal Government headed by Chancellor Adenauer at that time.

The claims conference has now had more than 40 years of experience in negotiating compensation measures for the benefit of Nazi victims, and I can tell you that we are right now still engaged in further steps and measures in this direction arising from the unification of Germany, which opened up an area of Germany.

The Communist regime, as you know, has failed to make any attempt to provide compensation to Holocaust survivors who lived and came from the territory which the German Democratic Republic, as it was then called, controlled.

As has been said before, the compensation payments are, at best, a very modest measure of compensation for immeasurable pain and suffering, and there is no way in which anyone can try to equate or monetarily measure and indemnify what has been done.

I want to call your attention, we have discussed here some of the steps and measures that agencies of our Government have taken domestically. I would like to put on the record something which I think is very important for us to bear in mind in connection with this legislation and with the entire issue.

The United States Government, in its international affairs, since the end of World War II, led and has exerted all of its efforts to promote within Germany and within Austria restitution and compensation legislation. I think it was to the credit of the United States Government that shortly after the war the first restitution and compensation legislation was enacted in the then American Zone of occupation of Germany. And to this day, the United States Government stands behind us in our efforts to achieve whatever still has to be done in this field, both in Germany and in Austria.

And, thus, we think we should bear in mind and contain it as part of our record the fact that both internationally and now domestically, but however not in as coordinated a way as it should be, the U.S. Government has recognized the uniqueness of the Holocaust and the special nature of any compensation payments.

I, therefore, hope and believe that the legislation which Congressman Waxman has introduced will be promptly enacted by the Congress of the United States and will again document the extraordinary moral and historic character of these compensation payments.

At this very late stage, and I want to recall to you it is now more than 60 years since Adolf Hitler came to power. Congressman Portman, you were indicating some question or concern about the fiscal implications.

This is a very finite group of individuals about whom we talk, and a finite group relatively time limited. You have heard before my colleagues mentioning to you that they attend more funerals than any other event in their circles. So there is no issue here of financial impact of any significance whatsoever. But it is an absolute moral imperative for a legislative foundation to be laid both in effect for and support of both the international policies of our Government and the various steps that various agencies of this Government have taken.

And, therefore, on behalf of the Conference on Jewish Material Claims Against Germany, which represents 24 of the largest Jewish organizations in this country and throughout the world, dedicated to the cause of compensation to the extent possible to the

survivors of the Holocaust, to record our wholehearted support and our hope that this legislation will unanimously be passed by the Congress of the United States.

Thank you, Mr. Chairman.

Mr. TOWNS. Thank you very much, Mr. Kagan.

[The prepared statement of Mr. Kagan follows:]

## CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GERMANY, Inc.

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## Statement of the Claims Conference for

H.R. 1873

To require certain payments made to victims of Nazi persecution to be disregarded in determining eligibility for and the amount of benefits or services based on need.

My name is Saul Kagan, and I am the Executive Director of the Conference on Jewish Material Claims Against Germany (Claims Conference) and the Committee for Jewish Claims on Austria. The Claims Conference is situated in New York and maintains a permanent office in Germany. I welcome the opportunity to express my appreciation to the initiative of Congressman Waxman regarding this issue.

I would also like to state that whatever I state in relation to Nazi victims from Germany applies to Nazi victims from Austria as well.

The Conference on Jewish Material Claims Against Germany was established in 1951 by 24 of the major international and national Jewish organizations, in response to the invitation by Dr. Konrad Adenauer, the first Chancellor of the German Federal Republic, to the State of Israel and representatives of World Jewry. Its major objectives were to negotiate with the German Federal Republic to gain indemnification for injuries inflicted upon individual victims of Nazi persecution, to gain restitution of property confiscated by the Nazis, and to obtain funds for the relief, rehabilitation, and resettlement of Jewish victims of Nazi persecution.

Starting in 1952 and continuing up until the present, the Claims Conference has negotiated the basic agreements with the German government which provide compensation to victims of Nazi persecution for deprivation of liberty, damage to health, and for other losses. These payments are of extreme importance to the Holocaust survivors, although no monetary payment can truly compensate for the pain, suffering, and losses which they experienced. The payments under the compensation law cannot be considered as ordinary income, as they represent only a modest measure of compensation for personal injury and suffering. No amount of monetary compensation can again make whole the suffering sustained by survivors of the Holocaust.

Member Organizations: Agudath Israel World Organization, Alliance Israelite Universelle, American Gathering/Federation of Jewish Holocaust Survivors, American Jewish Congress, American Jewish Joint Distribution Committee, American Zionist Federation, Anglo-Jewish Association, B'nai B'rith International, Board of Deputies of British Jews, Canadian Jewish Congress, Central British Fund for World Jewish Relief, Centre of Organizations Holocaust Survivors in Israel, Conseil Représentatif des Institutions Juives de France, Council of Jews From Germany, Delegacion de Asociaciones Israelitas Argentinas, Executive Council of Australian Jewry, Jewish Agency for Israel, Jewish Labor Committee, South African Jewish Board of Deputies, Synagogue Council of America, World Jewish Congress, World Union for Progressive Judaism, Zentralrat der Juden in Deutschland.



Simultaneously, the Claims Conference has also been instrumental in negotiating agreements with the German Federal Government to provide for the restitution of Jewish property confiscated or forcibly sold or abandoned as a result of Nazi persecution, most recently concerning Jewish private and communal property in the former German Democratic Republic.

I would like to take this opportunity to express on the record our appreciation for the continuing support that the Claims Conference has received from the U.S. Government in all its efforts to secure compensation and restitution for Jewish victims of Nazi persecution. This support has persevered throughout all the administrations, and currently continues in connection with our efforts to secure optimal restitution of Jewish property in the territory of the former German Democratic Republic, which, since October 1990, is part of the unified Germany.

Even before the end of World War II, the major Jewish organizations called upon the Allied powers and, subsequently, upon the governments of Germany and Austria, to provide compensation to the survivors for their personal injury and suffering and for the restitution of lost property. The United States was the first to respond to these efforts: The first Property Restitution Law in Germany was enacted by the U.S. Military government in 1947, covering the American Zone of Germany. The U.S. Military government was also instrumental in stimulating the first German State Governments, prior to the establishment of a Federal German Government in 1949, to enact the first limited regional compensation laws. It was painfully clear to all concerned that these legislative steps could, at best, provide only a measure of compensation for the pain and suffering undergone by victims of Nazi persecution.

We also appreciate that various departments of the U.S. government have by now recognized the special character of the payments received by Nazi victims. The IRS recognized this issue many years ago, and therefore does not consider the indemnification payments received by Nazi victims as taxable income. When the issue of eligibility for housing subsidies arose, HUD also recognized that the compensation payments should not be considered as income in determining eligibility for government subsidized housing.

This issue has also arisen in connection with the effect of indemnification payments on eligibility for the receipt of SSI benefits. I refer here to the "Grunfelder case," which was ably represented by Bet Tzedek Legal Aid Services in Los Angeles. As a result of this case, the Social Security administration agreed that these payments are not to be considered when determining income eligibility for SSI benefits.

Although we are grateful for what the individual departments have done regarding this issue, we welcome Congressman Waxman's initiative to provide a firm legislative foundation for these and all other possible government benefits, rather than leaving it to the determination of the separate governmental departments.

Our own extensive involvement for more than 40 years with victims of Nazi persecution in this country indicates that the great majority of Nazi victims, many of whom arrived to the United States in the late 1940's, were able to become self-supporting, and are not recipients of supplementary income payments, SSI, or HUD-run subsidies. They have built new lives for themselves, established families, and continue to make a significant contribution to their communities.

It should also be borne in mind that those Nazi victims who are recipients of benefits are now elderly, and many are already truly aged. The primary concern of the Claims Conference is to ensure that whatever modest compensation Holocaust survivors manage to receive for their pain and suffering is not diminished in any way. Congressman Waxman's bill will accomplish this objective.

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Mr. TOWNS. Mr. Feuer.

Mr. FEUER. YES.

Good morning, my name is Michael Feuer. I am an attorney and the executive director of Bets Tzedek Legal Services, the House of Justice in Los Angeles. I urge you to pass H.R. 1873.

Since 1974, Bet Tzedek has provided free legal assistance on more than 80,000 poverty law cases, including thousands of Government benefits matters. Bet Tzedek assists Holocaust survivors to receive restitution for Nazi persecution. We have played a leading role in developing law excluding Holocaust restitution from financial eligibility considerations for need-based Government programs.

Holocaust survivors have suffered enough. Yet those living at the margins, like Fanny Schlomowitz, face the potential loss of basic necessities of life because Federal agencies have lacked guidance on how to treat Holocaust restitution payments when making benefit-eligibility decisions.

We support H.R. 1873 because it would establish a clear rule excluding Holocaust restitution from these decisions. In addition, the bill would preclude survivors from having continually to establish that new forms of Holocaust restitution should also be excluded from these decisions. H.R. 1873 would have little fiscal impact. It is consistent with all judicial precedent, legislation, and rules on this subject.

For example, Social Security Administration rules, adopted following Federal court decisions, exclude certain Holocaust restitution payments from financial eligibility decisions for need-based Government benefits programs.

Bet Tzedek brought the seminal litigation in this area. Our client was Felicia Grunfeder. When she was a young girl, her parents attempted to smuggle her out of the Warsaw ghetto in a coffin that had been nailed shut. Nonetheless, she ultimately was captured by the Nazis and made to endure the horrors of a death camp. She emerged, but with disabling psychological scars.

After arriving in this country, Ms. Grunfeder began to receive restitutionary payments from Germany because she is a survivor of Nazi persecution. Because of her disability, she also began to receive SSI benefits. But when our Government learned that she was a recipient of German Holocaust restitution, it terminated her SSI on the ground that Holocaust restitution constitutes income, placing her above eligibility limits.

Bet Tzedek took Ms. Grunfeder's case to the Federal Court of Appeals. In the 1984 decision *Grunfeder v. Heckler*, the ninth circuit ruled that Holocaust restitution should be disregarded in SSI eligibility decisions. The court noted Congress' historical acknowledgment of the unique tragedy of the Holocaust and the special consideration owed to its survivors. The court also sought to give effect to the restitutionary intent of a foreign nation. Our Government would undermine this intent were it to count Holocaust restitution in SSI eligibility decisions, because survivors would then have to spend restitution on basic necessities.

Further, the court pointed out that our Government made payments to Native American tribes and excluded those restitutionary payments from SSI eligibility decisions. Indeed, since that time,

Congress, as Congressman Payne has pointed out, has provided restitution to Japanese-Americans who were interned during World War II and specifically excluded those payments from all consideration for need-based Government benefit programs.

The Social Security Administration adopted the Grunfeder rule nationwide and, following a 1990 court decision, applied it to Austrian restitutionary payments as well.

Notwithstanding this and other similar legislative and administrative rules, passing H.R. 1873 now is important. Given existing rules and the age of most Holocaust restitution recipients, this bill would not suddenly entitle thousands of previously ineligible claimants to new benefits. But as an ethical matter, H.R. 1873 would assure that Holocaust survivors with like claims be treated identically by all Federal agencies, preventing another survivor like Fanny Schlomowitz from suffering needless anxiety, or worse, the loss of crucial benefits.

In addition, the bill would preclude Federal agencies from having to decide piecemeal how to treat payments under new Holocaust restitution programs. For example, last year Germany created a new Holocaust restitution program for people who were confined in concentration camps or in ghettos. The restitutionary purpose of this new program is absolutely consistent with the program at issue in *Grunfeder*. But because the program is new, and because here has been no litigation surrounding it, current SSI rules do not exclude payments under this Holocaust restitution program from being counted in SSI eligibility decisions.

Finally, this bill would insulate survivors from changes in executive branch policy. For instance, the Social Security Administration could decide to stop its unilateral application of the Grunfeder rule nationwide.

In sum, every effort to address the impact of Holocaust restitution on eligibility for need-based benefits has excluded Holocaust payments from these determinations. Existing rules, though, were formulated on an ad hoc basis with the result that there are gaps in law through which Holocaust survivors have fallen, and could continue to fall, absent H.R. 1873.

This bill would make Federal treatment of Holocaust restitution clear and consistent, avoiding the dilemmas confronted by Fanny Schlomowitz and HUD, and by Ms. Grunfeder and others before her.

The bill would have, as I said before, little fiscal impact. That is an important point. We urge you to pass H.R. 1837, and I would welcome any questions from any member of the committee. Thank you.

Mr. TOWNS. Thank you, too.

[The prepared statement of Mr. Feuer follows:]





# BET TZEDEK LEGAL SERVICES

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## TESTIMONY IN SUPPORT OF HR 1873 (WAXMAN)

### HOUSE COMMITTEE ON GOVERNMENT OPERATIONS SUBCOMMITTEE ON HUMAN RESOURCES

by Michael Feuer  
Executive Director, Bet Tzedek Legal Services

November 10, 1993

#### I. INTRODUCTION

Good morning. My name is Michael Feuer, and I am an attorney and the Executive Director of Bet Tzedek Legal Services, the House of Justice in Los Angeles. I urge you to pass HR 1873.

Bet Tzedek has provided free legal assistance on more than 80,000 cases since opening our doors in 1974. Our staff and volunteers serve clients on a wide range of poverty law matters, including advocacy on need-based government entitlement issues. We work principally on behalf of the elderly or the disabled. Bet Tzedek is the only organization in the world of which we are aware that, without charge, assists survivors of the Holocaust to receive restitution for Nazi persecution.

Of particular relevance to today's hearing, Bet Tzedek has played an important role in developing law on the exclusion of Holocaust restitution payments when determining financial eligibility for need-based government entitlements.

#### II. SUMMARY OF ARGUMENTS IN SUPPORT OF HR 1873

We support HR 1873 because it would provide clear direction to all federal officials on excluding Holocaust restitution payments from financial eligibility determinations for need-based government entitlements.

Bet Tzedek Legal Services provides free legal services to needy persons without regard to race, religion or national origin. Bet Tzedek Legal Services is a project of BET TZEDEK (the House of Justice), a non-profit organization. Contributions are tax deductible. BET TZEDEK is funded in part by the Jewish Federation Council of Los Angeles, United Way, the Legal Services Corporation, the State Bar of California, the Los Angeles County Bar Foundation, the City and County of Los Angeles and the City of West Hollywood.



HR 1873 Testimony  
Michael Feuer  
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Holocaust survivors have suffered enough. Yet, those living at the margins—like Fanny Schlomowitz, whose case attracted national attention earlier this year—have faced the potential loss of basic necessities of life, because of confusion and uncertainty within United States agencies over how Holocaust restitution payments from foreign governments should be treated when determining eligibility for key entitlements.

HR 1873 would eliminate needless uncertainty among government authorities by assuring that Holocaust survivors' restitution payments are treated consistently by all federal agencies. The bill would also preclude survivors from having continually to establish, through litigation or otherwise, that new forms of Holocaust restitution paid by foreign governments should be excluded from eligibility calculations—as currently is the rule for certain benefits.

HR 1873 is consistent with all existing federal legislation and rules, and all judicial precedent, on this subject. It would have little fiscal impact. Particularly now, with a new German restitution program underway to make payments to survivors of ghettos and death camps, Congress should prevent survivors from enduring unnecessary further hardship by passing this uncontroversial measure.

### **III. LEGAL BACKGROUND: CASES, FEDERAL RULES AND FEDERAL AND STATE LEGISLATION ON THIS SUBJECT ARE UNIFORMLY CONSISTENT WITH HR 1873**

#### **a. All directly relevant caselaw supports HR 1873**

Currently, Social Security Administration rules—adopted following federal court decisions—exclude certain Holocaust restitution payments from being counted in determining financial eligibility for Supplemental Security Income (SSI) benefits, paid to the aged, blind or disabled.

Bet Tzedek brought the seminal litigation in this area. Our client was Felicia Grunfeder. As a young girl she lived in the Warsaw ghetto. To save her life, her parents attempted to smuggle her out of the ghetto, in a coffin that had been nailed shut. Nonetheless she ultimately was captured by the Nazis, and made to endure the horrors of a concentration camp. She emerged from the camp with disabling psychological scars.

After arriving in the United States, Ms. Grunfeder began to receive monthly restitutionary payments from Germany because she was a survivor of Nazi persecution. Later, because of her disability, she also began to receive SSI benefits. When our government learned of Ms. Grunfeder's receipt of German restitution, however, it terminated her SSI payments on the ground that her Holocaust restitution constituted income placing her above eligibility limits.

Bet Tzedek took Ms. Grunfeder's case to the Federal Court of Appeals. In the 1984 decision Grunfeder v. Heckler, the Ninth Circuit ruled that Holocaust restitution payments should not be counted in determining financial eligibility for SSI. The court noted Congress' historical acknowledgement of the unique tragedy of the Holocaust, and the special consideration owed to its survivors. The court also sought to give effect to the restitutionary intent of a foreign government. Our government would undermine this restitutionary intent were it to include Holocaust payments in eligibility decisions, because survivors would then have to spend Holocaust restitution on basic necessities. Further, the court pointed out that Congress had already excluded restitutionary payments our government makes to certain Native American tribes from SSI eligibility decisions.

Since Grunfeder was decided, Congress has also provided restitution to Japanese-Americans interned during World War II, and specifically excluded these payments from eligibility determinations for need-based federal benefits.

The Social Security Administration adopted the Grunfeder rule nationwide, though legal rules limiting the applicability of precedent did not require the Administration to do so. The Administration then memorialized the Grunfeder rule in the non-binding POMS (Program Operations Manual System), a guide used by Administration caseworkers in their daily interaction with claimants.

In 1990, a lower federal court applied the Grunfeder rule to Holocaust restitution payments made pursuant to certain provisions of the Austrian Social Insurance Act. The court ordered that these payments be disregarded when determining eligibility for SSI benefits. The Social Security Administration memorialized this decision, too, in the POMS.

**b. Other federal legislation and rules, and state law, are consistent with HR 1873**

In recognition of the unique suffering and injustice endured by Holocaust survivors, other legislation and rulings similarly exclude Holocaust restitution payments from income calculations for federal purposes.

- \* Congress has excluded German Holocaust restitution payments from Medicaid eligibility determinations for nursing home residents.
- \* For over 30 years, the Internal Revenue Service has exempted Holocaust restitution paid by Germany and Austria to American taxpayers from federal income tax.
- \* As you have heard, the Department of Housing and Urban Development now excludes Holocaust restitution from eligibility determinations for low-income housing benefits.
- \* In California, state law excludes Holocaust restitution from eligibility determinations for Medi-Cal, the state's version of Medicaid.

**IV. NOTWITHSTANDING EXISTING LAW, HR 1873 PROVIDES IMPORTANT PROTECTION TO HOLOCAUST SURVIVORS, AND NEEDED GUIDANCE TO FEDERAL AGENCY PERSONNEL**

Notwithstanding this body of law and rules, passing HR 1873 is important. Because of existing rules and the age of most Holocaust restitution recipients, this bill would not suddenly entitle thousands of previously ineligible government benefits claimants to new benefits. As an ethical matter, though, HR 1873 would assure that Holocaust survivors with like claims receive identical treatment from all federal agencies. In addition, the bill would obviate the need for further litigation and other inefficient means of establishing that our government should treat new forms of Holocaust restitution as it has those programs already in effect.

You have heard today about the uncertainty within HUD regarding the case of Fanny Schlomowitz, a low-income Holocaust survivor whose situation exemplifies why this legislation is necessary. Irrespective of the

various rules and court decisions pertaining to Holocaust restitution for purposes of other federal benefits, HUD initially included Ms. Schlomowitz's Holocaust restitution payments in determining her eligibility for HUD housing. It then more than doubled her rent. Ms. Schlomowitz protested the rent increase with help from Senator DeConcini. HUD officials responded by seeking additional guidance from superiors in Washington. They also suggested Congressional action would be necessary. Ultimately, HUD issued a rule excluding Holocaust restitution from HUD eligibility determinations, but only after Ms. Schlomowitz had gone through weeks of anxiety.

Holocaust survivors have suffered enough. They should not have to confront the potential loss of matters critical to daily living—a fate which might have befallen Ms. Schlomowitz had her case not been so highly publicized. This bill would clarify the law and provide all federal authorities the guidance they need in addressing this issue.

In addition, this legislation would prevent the necessity for future litigation and other inefficient means of establishing that forms of Holocaust restitution should be excluded from eligibility determinations. For example, in the past year Germany created a new program under which Holocaust survivors who were interned in concentration camps or confined to ghettos would be eligible for lifetime monthly restitution. This program was created under Article 2 of the Reunification Act between East and West Germany.

Clearly the restitutionary purpose of this new program is completely consistent with the German program specifically mentioned in the Social Security Administration POMS manual. Because the Article 2 program is new, and because there has been no litigation surrounding it, however, payments provided under it are not specifically excluded from SSI eligibility determinations. By establishing a clear, humane rule consistent with existing law, this bill would preclude officials of agencies like the Social Security Administration from having to decide piecemeal how to treat payments under new Holocaust restitution programs, such as Germany's Article 2 payments.

Finally, HR 1873 would insulate survivors from possible changes in executive branch policy on this issue. As I have discussed, for instance, the Social Security Administration could stop its nationwide application of the Grunfeder rule unilaterally.

**V. HR 1873 WOULD HAVE LITTLE FISCAL IMPACT**

HR 1873 would have little fiscal impact. Because most Holocaust survivors who receive Holocaust restitution are senior citizens, the United States government entitlements for which they most frequently would apply would be SSI, Medicaid, and, perhaps, HUD-related. The rules governing SSI already exclude one form of German restitution, and one form of Austrian restitution, from eligibility determinations. The rules regarding Medicaid for nursing home residents, and all California residents, exclude German restitution from eligibility determinations. And the rules governing HUD entitlements already contemplate excluding Holocaust restitution from eligibility determinations. Thus, the bill would likely have only minor incremental impact on the public fisc.

**VI. CONCLUSION: HR 1873 WOULD ESTABLISH A CLEAR, CONSISTENTLY-APPLICABLE RULE THAT PROTECTS HOLOCAUST SURVIVORS AND PROVIDES NEEDED GUIDANCE TO FEDERAL OFFICIALS**

In sum, federal and state efforts to address the impact of Holocaust restitution on recipients' eligibility for need-based entitlements have uniformly excluded Holocaust payments from eligibility determinations. Existing rules, however, were formulated on an ad hoc basis. The result: gaps in law through which Holocaust survivors have fallen, and could continue to fall, absent HR 1873. This bill would make federal treatment of Holocaust restitution payments clear and consistent, avoiding the dilemmas confronted by HUD and Fanny Schalomowitz, and by Ms. Grunfeder and others before her. Anticipating potential future issues to arise from the new German or other yet-to-be created Holocaust restitution programs, HR 1873 would also preclude the need for future litigation or federal agency analysis by establishing a plain, broadly applicable rule. We urge you to pass HR 1873.



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[4] We have no alternative but to dismiss the petition for review. This is a court of limited jurisdiction, exercising only those powers delegated to us by Congress. We can review decisions of the Benefits Review Board only when they are brought before us under the conditions and within the time specified by statute. Unfortunately, the present petition does not qualify when judged by this standard. We note that petitioner's present counsel, who has made an appealing plea in support of our jurisdiction, did not represent him at the time of the decision of the Benefits Review Board and is not responsible for the late filing of this petition.

The motion to dismiss is granted, and the petition for review is

Dismissed.



Felicia GRUNFEDER,  
Plaintiff, Appellant,

v.

Margaret HECKLER, Secretary of  
Health and Human Services,  
Defendant, Appellee.

No. 82-5751.

United States Court of Appeals,  
Ninth Circuit.

Argued and Submitted En Banc  
Sept. 13, 1984.

Decided Nov. 26, 1984.

Former recipient of supplemental security income sought review of Social Security Administration's decision to terminate her benefits. The United States District Court for the Central District of California, Cynthia Holcomb Hall, J., affirmed and recipient appealed. The Court of Appeals, 706 F.2d 452, affirmed. On rehearing en banc, the Court of Appeals, Ferguson, Cir-

cuit Judge, reversed, holding that reparations payments the German Federal Republic makes to survivors of the Holocaust do not constitute countable income in determining eligibility for SSI.

Vacated and remanded.

Ferguson, Circuit Judge, filed a concurring opinion in which Schroeder and Alarcon, Circuit Judges, joined.

Nelson, Circuit Judge, concurred in part.

Goodwin, Circuit Judge, dissented and filed an opinion in which Wallace, J. Blaine Anderson, and Canby, Circuit Judges, concurred.

### 1. Social Security and Public Welfare ⇐175

Interpretation of German Restitution Act by the Secretary of Health and Human Services for supplemental security income purposes is entitled to little deference.

### 2. Statutes ⇐219(1)

Courts are the final authority on questions of statutory construction, particularly in areas where the construction requires consideration of broad concerns beyond an agency's expertise.

### 3. Social Security and Public Welfare ⇐175

Reparations payments made by the German Federal Republic to survivors of the Holocaust under the Federal Law for the Compensation of Victims of National Socialist Persecution do not constitute countable "income" for purposes of determining eligibility of the recipient for supplemental security income. Social Security Act, §§ 1611(a)(1), 1612, as amended, 42 U.S.C.A. §§ 1382(a)(1), 1382a.

### 4. International Law ⇐10.1

Absent an expression of congressional intent to the contrary, considerations of courtesy and mutuality require courts to construe domestic legislation in a way that minimizes interference with the purpose or effect of foreign law.

Terry B. Friedman, Elyse S. Kline, Jana Zimmer, Josh A. Lazar, Bet Tzedek, Legal Services, Los Angeles, Cal., for plaintiff, appellant.

James R. Arnold, Asst. U.S. Atty., Los Angeles, Cal., Dennis J. Mulshine, Asst. Reg. Atty., San Francisco, Cal., Lois Waldman, New York City, for defendant, appellee.

An Appeal from the United States District Court for the Central District of California.

Before GOODWIN, WALLACE, ANDERSON, SCHROEDER, PREGERSON, ALARCON, FERGUSON, NELSON, CANBY, BOOCHEVER, and REINHARDT, Circuit Judges.

PREGERSON, Circuit Judge:

#### INTRODUCTION

We took this case en banc to decide the narrow question whether reparations payments that the German Federal Republic makes to survivors of the Holocaust constitute countable "income" in determining eligibility for supplemental security income (SSI) under the Social Security Act (the Act), 42 U.S.C. §§ 1381-1383c (1976 & Supp. IV 1980). Congress has not addressed this precise question. Neither the Act, its legislative history, nor its implementing regulations explicitly mention German reparations payments made pursuant to the Federal Law for the Compensation of Victims of National Socialist Persecution of June 28, 1956.<sup>1</sup> For the reasons stated below, we reverse the Social Security Administration's (SSA) determination

that German reparations payments are income for the purpose of determining SSI eligibility.

#### FACTS

Felicia Grunfeder, born a year before the Germans invaded Poland in World War II, was confined with her family in the Warsaw ghetto. She escaped in a coffin lifted over the fence separating the Jewish cemetery from the Polish cemetery. Grunfeder then lived with a Polish family in the Polish section of Warsaw until the Nazis imprisoned them in the Lager Rote-Rose concentration camp. Liberated by the Americans at the end of the war, Grunfeder was reunited with her mother. They both relocated to the United States in 1949. Grunfeder's father and the other members of her family perished at the hands of the Nazis.

Grunfeder developed severe psychological problems as a result of her experiences during the war. She petitioned the German government under the German Restitution Act and started receiving monthly reparations payments of 159 DM (approximately \$228) in 1968. Because the psychological effects she suffers have been disabling, Grunfeder applied for and began receiving SSI payments of \$119 in 1974. In 1980, the SSA learned that Grunfeder was receiving German reparations payments and terminated her SSI benefits on the ground that the reparations payments constituted "unearned income" under the Act and made her ineligible for SSI benefits.

The Secretary denied Grunfeder's motion for reconsideration, an administrative law judge denied her appeal, and the Appeals

1. Hereafter referred to as the "German Restitution Act."

The German Restitution Act grew out of post-war demands for reparations. Direct negotiations with Germany over the issue of reparations were conducted along two fronts: between Germany and Israel towards a lump sum settlement of Israel's claims, and between Germany and the Conference of Jewish Material Claims Against Germany for a resolution of individual claims.

After extensive negotiations, the government of Germany and the Conference on Jewish Material Claims signed a protocol on Sept. 10, 1952. The protocol set out principles for future legislation on reparations for individual claimants. The Federal Republic of Germany subsequently implemented these principles in the German Restitution Act. The statute provides for restitution for several types of claims, including the loss of property, possessions, and economic advancement, and injury to body and health.

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Council denied her request for a review of the ALJ's decision. Exercising jurisdiction under 42 U.S.C. § 405(g) (1976 & Supp. IV 1980), the district court dismissed Grunfeder's complaint seeking review of the ALJ's decision. Grunfeder now appeals to this court.

## STANDARD OF REVIEW

Our court has "carefully examined [the question] when the receipt of an item of value by an SSI beneficiary constitutes income which is actually available to meet the beneficiary's basic needs." *Summy v. Schweiker*, 688 F.2d 1233, 1235 (9th Cir. 1982); see *Whaley v. Schweiker*, 663 F.2d 871, 873-75 (9th Cir.1981).

In *Whaley*, we overturned the determination of the Secretary of Health and Human Services that the amount of increased pension benefits the Veterans Administration pays a veteran for the support of his dependent children constitutes income in determining SSI eligibility. 663 F.2d at 875. We dismissed the Secretary's argument that because the veteran could use the dependent's portion for his own needs, that amount fell within the SSA's definition of income as "anything [an individual can use] to meet [his] basic needs for food, clothing, or shelter." 20 C.F.R. § 416.1102(a) (1981). In determining the proper accommodation between the Veterans Administration regulations and the SSI provisions, we noted that "[t]he interpretation of the Veterans Administration regulations by the Secretary of Health and Human Services, a department unrelated to the Veterans Administration,] is not entitled to deference." 663 F.2d at 873.

[1] Likewise, the Secretary's interpretation of the German Restitution Act and the intended uses of reparations payments is entitled to little deference. Although we generally give some deference to an implementing agency's interpretation of a statute,

where, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, "[t]he deference

owed . . . cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.'

*NLRB v. Brown*, 380 U.S. 278, 292, 85 S.Ct. 980, 988, 13 L.Ed.2d 839 (1965) (quoting *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318, 85 S.Ct. 955, 967, 13 L.Ed.2d 855 (1965)).

In determining that the definition of income for SSI eligibility purposes includes German reparations payments, the SSA implicitly balanced our Government's interest in allocating a limited pool of funds to support the country's aged, blind, and disabled against our Government's interest in restoring a semblance of normal existence to Holocaust survivors who live in the United States. This type of policy decision, which implicates foreign affairs, is outside the Secretary's expertise.

[2,3] Congress has vested reviewing courts with the duty to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706 (1976). Courts are the final authority on questions of statutory construction, *Tulalip Tribes of Washington v. FERC*, 732 F.2d 1451, 1454 (9th Cir.1984), particularly in areas where, as here, the construction requires consideration of broad concerns beyond the agency's expertise. As we construe the Act's relevant SSI provisions, 42 U.S.C. §§ 1381-1383c, German reparations payments are not includable as income. Therefore, we find that the Secretary's contrary determination is "not in accordance with law," 5 U.S.C. § 706(2)(A), and we set it aside.

## DISCUSSION

The SSI program is designed to supplement the income of needy aged, blind, or disabled persons. See 42 U.S.C. § 1381 (1976). An individual is eligible for SSI benefits if his annual "income" is below \$1,752 and his "resources" are less than \$1,500. *Id.* § 1382(a)(1). Congress defines



"income" for SSI purposes in § 1382a as both "earned" and "unearned" income. Congress specifies that earned income means "only" wages, net earnings from self-employment, refunds of Federal income tax, and remuneration for services performed in a work activities center. *Id.* § 1382a(a)(1) (Supp. IV 1980). In contrast, Congress generally describes unearned income as "all other income," including seven categories of receipts. *Id.* § 1382a(a)(2) (A)-(F) (1976). Although Congress lists 12 types of receipts that "shall be excluded" from income, *id.* § 1382a(b) (1976 & Supp. IV 1980), Congress never defines the term "income" itself and leaves considerable flexibility in the statutory criteria for eligibility.

The SSA, however, has expansively defined "income" as "the receipt by an individual of any property ... which he can apply ... to meeting his basic needs for food, clothing, and shelter." 20 C.F.R. § 416.1102(a) (1980).<sup>2</sup> The SSA excludes only those receipts listed in other sections of the regulations. *See, e.g.*, 20 C.F.R. §§ 416.1106-416.1112, 416.1145-416.1175 (1980). On the basis of this administrative definition and the fact that German reparations payments are not specifically listed as an exclusion, the Secretary argues that reparations payments are countable income.

As stated earlier, Congress has not explicitly addressed the narrow question whether German reparations payments are income for the purposes of determining SSI eligibility. To ascertain Congress's intent on this question, we first look to the history of how Congress has treated Holocaust survivors. We then examine how Congress and the SSA have treated analogous payments. Finally, we employ the doctrine of

international comity to aid us in determining congressional intent.

#### A. *History: Congress and its Treatment of Holocaust Survivors*

We first examine the question presented by this case, and the pertinent SSI provisions, in the light of federal policy according special consideration to victims of the Holocaust.

In 1948, Congress welcomed the Holocaust survivors to the United States by excluding them from immigration quota requirements. *See* Displaced Persons Act of 1948, 50 U.S.C.App. §§ 1951-1965 (1952), amended by 50 U.S.C.App. §§ 1951-1965 (1958), omitted at 50 U.S.C.App. §§ 1951-1965 (1976).

Even before Congress addressed the issue of taxing German reparations payments, the Internal Revenue Service (IRS) had consistently ruled that reparations payments did not constitute "income" because they "are in the nature of reimbursement for the deprivation of civil or personal rights." Rev.Rul. 58-500, 1958-2 C.B. 21; *see also* Rev.Rul. 56-518, 1956-2 C.B. 25 (using same language). Congress subsequently confirmed the IRS's assumption that Congress intended to exclude German reparations payments from taxable income because of their penitential purpose and restitutory character. In 1954, the Senate ratified the Convention Between the Federal Republic of Germany and the United States of America for the Avoidance of Double Taxation with Respect to Taxes on Income, July 22, 1954, 5 U.S.T. 2788, T.I.A.S. No. 3133, and in 1965, ratified a protocol modifying the 1954 convention. The protocol exempted from income taxation the reparations payments made to Holocaust victims residing in the United States.<sup>3</sup>

2. The current regulations retain a need-based definition of "income." *See* 20 C.F.R. § 416.1102 (1984) ("[I]ncome" is anything [one] receive[s] in cash or in kind that [one] can use to meet [one's] needs for food, clothing, or shelter").

3. Immediately after World War II, the temporary martial government existing in Germany administered Military Law No. 59 (approved Nov. 10, 1947). With regard to property confiscated from the victims during the war, Article 91 provided that "[t]axes and other public levies shall not be imposed in connection with restitution."

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pensions, annuities and other amounts paid by one of the contracting States or by a juridical person organized under the public laws of that State as compensation for an injury or damage sustained as a result of hostilities or political persecution shall be exempt from tax by the other State.

Protocol Modifying the Convention Between the Federal Republic of Germany and the United States of America for the Avoidance of Double Taxation with Respect to Taxes on Income and to Certain Other Taxes, Sept. 7, 1965, art. XI(1)(c), 18 U.S.T. 1875, 1884, T.I.A.S. No. 5920.

Moreover, in 1978, the House and Senate passed a joint resolution designating April 28 and 29, 1979, as "Days of Remembrance of Victims of the Holocaust," in recognition of the fact that "on April 28 and 29 of 1945 the Armed Forces of the United States liberated the surviving victims of Nazi imprisonment in the concentration camp in Dachau, Germany, and revealed to the world evidence of a tragic human holocaust that must never be forgotten." H.R.J.Res. 1014, 95th Cong., 2d Sess., 124 Cong.Rec. 26725, enacted but not codified, 92 Stat. 623 (1978).

Two years later, Congress ensured that Americans would remember the Holocaust by establishing the United States Holocaust Memorial Council. 36 U.S.C. §§ 1401-1408 (1982) (enacted Oct. 7, 1980). The Council's functions include providing for "appropriate ways for the Nation to commemorate the Days of Remembrance, as an annual, national, civic commemoration of the holocaust," and constructing "a permanent living memorial museum to the victims of the holocaust." *Id.* § 1401. The accompanying House Report states:

The holocaust has been recognized as the systematic act of extermination of nearly 6 million Jews in Europe before and during World War II. During this same period millions of people suffered death and destruction at the hands of those who embraced the Nazi philosophy. The records of history fail to provide evidence of another act of genocide of

this, or even approaching this, magnitude.

The armies of the United States were the primary discoverers of the locations used for extermination, the records of the systematic genocide and the few survivors. Of those few survivors of the holocaust, many subsequently emigrated to the United States and they and their descendants now form an integral part of our society. The historic perspective of the nation has been clearly affected by this event in such a way that historians generally recognize the holocaust as an occurrence of the history of the United States.

H.R.Rep. No. 1347, 96th Cong., 2d Sess. 4, reprinted in 1980 U.S.Code Cong. & Ad. News 3343, 3344.

Congress has thus acknowledged that unprecedented atrocities were committed during the Holocaust, accepted the surviving victims as members of our society, and accorded special recognition to the German government's reparations payments by excluding them from Federal income tax. Therefore, even though Congress has not spoken explicitly on the issue whether German reparations payments are to be excluded from income for SSI eligibility purposes, Congress's reaction to the Holocaust and its recognition of the restitutionary nature of the reparations payments indicate an intent to exclude those payments from countable income for SSI purposes.

#### B. *How Congress and the SSA Have Treated Analogous Receipts*

In at least one analogous situation, Congress has explicitly excluded reparations payments from the computation of income for SSI purposes. In the Blackfeet and Gros Ventre Tribes of Montana Judgment Funds Distribution Act, 25 U.S.C. §§ 1261-1265 (1976), Congress provides that payments the United States Government makes to two Native American tribes are excluded from income for both federal income tax and SSI eligibility purposes. *Id.* § 1264. As Senator Ribicoff observed, the SSI exclusion for these payments "follows Congressional intent to rectify past wrongs."



tice perpetrated against the American Indian." 118 Cong.Rec. 4027 (1972). Similarly, Holocaust survivors receive reparations payments to make amends for past injustices and horrors perpetrated against them by the Nazis. These payments are not designed to support basic needs, but to assuage psychological wounds that will never heal. The fact that the Blackfeet and Gros Ventre payments are not included in the SSI list of exclusions from income, see 42 U.S.C. § 1382a(b) (1976), indicates that the list is not exclusive and that Congress may have intended to exclude similar receipts not specified in the list.

Moreover, the SSA in effect concedes this interpretation. It excludes from income federal reparations payments to Alaskan Native Americans even though Congress has not explicitly provided for their exclusion in either the Act or the legislation establishing the payments. See Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1628 (1976 & Supp. IV 1980). Congress specifically provides that the Alaskan payments are exempt from income taxation, *id.* § 1620(a) (1976), but does not mention whether they are also excluded from income for SSI purposes. Apparently treating the income tax exemption as an indication of congressional intent, the SSA excluded the Alaskan native payments from income for SSI purposes "to the same extent that those payments are exempt from taxation by reason of [the Alaska Native Claims Settlement Act]." 20 C.F.R. § 416.1146(1) (1980).<sup>4</sup>

The SSA's willingness to exclude the Alaskan native payments despite congressional silence undermines the Secretary's argument that German reparations payments are non-excludable unless Congress has expressly provided otherwise. The inconsistency in this position is even more pronounced when we focus on the basis for excluding the Alaskan payments—the income tax exemption—which is equally applicable to the German reparations payments.

4. The Administration has dropped the income tax qualification in its most recent regulation on point, and now excludes all of the Alaskan na-

As the Supreme Court observed in *Morton v. Ruiz*, 415 U.S. 199, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974), "the weight of an administrative interpretation will depend, among other things, upon 'its consistency with earlier and later pronouncements' of an agency." *Id.* at 237, 94 S.Ct. at 1075 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944)). The exclusion of Blackfeet, Gros Ventre, and Alaskan Native payments, when considered in light of congressional concern for the victims of the Holocaust, provides us with a solid basis for finding German reparations payments excludable in determining eligibility for SSI benefits and for setting aside the Secretary's anomalous interpretation.

In an effort to minimize the importance of these analogous examples, the Secretary cites two other types of benefits that Congress does include as income for SSI purposes: workers' compensation and veterans' compensation payments. See 42 U.S.C. § 1382a(a)(2)(B) (1976). Here, the analogy is inapposite. Unlike German reparations, workers' compensation payments arise from a commercial employee-employer relationship. They are essentially a substitution for loss of earnings, not compensation for an injustice committed upon the employee. Indeed, workers' compensation is paid without regard to fault; the premiums imposed on the employer fund insurance against workplace injury.

The inclusion of veterans' compensation payments is noninstructive for similar reasons. Veterans' payments do not embody an admission of fault or expression of penitence for deprivation of personal rights. The absence of a penitent purpose thus distinguishes both types of payments from the German reparations payments.

In short, because both Congress and the SSA have excluded analogous reparations payments from income in determining SSI eligibility, and because workers' compensation and veterans' compensation payments

tive payments from income for SSI purposes regardless of their taxability. 20 C.F.R. § 416.1124(b), app. IV(a) (1984).

are distinguishable, it is reasonable to conclude that Congress intended to exclude German reparations payments.

### C. *The Role of International Comity*

[4] The doctrine of international comity gives us another reason for concluding that Congress intended to exclude German reparations payments from income for SSI purposes. Absent an expression of congressional intent to the contrary, considerations of courtesy and mutuality require our courts to construe domestic legislation in a way that minimizes interference with the purpose or effect of foreign law. See, e.g., *Lauritzen v. Larsen*, 345 U.S. 571, 576-78, 592-93, 73 S.Ct. 921, 925-26, 933-34, 97 L.Ed. 1254 (1953) (term "[a]ny seaman" in Jones Act held not to include Danish sailor with regard to events on Danish ship outside U.S. waters); *Foley Bros. v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949) (term "[e]very contract" in Eight Hour Law held not to include a contract between the U.S. and a private contractor for work in a foreign country). This principle of statutory construction, "a valid approach whereby unexpressed congressional intent may be ascertained," is "based on the assumption that Congress is primarily concerned with domestic conditions." *Foley*, 336 U.S. at 285, 69 S.Ct. at 577.

There are two reasons why we think the principles of comity support setting aside the SSA's determination that German reparations payments are countable income.

First, including German reparations payments as income for the purpose of determining SSI eligibility would frustrate the German Restitution Act's penitent and restitutionary purposes. Depriving Grunfeder of SSI benefits would force her to spend the reparations payments on basic necessities and leave her with no restitution for the suffering she endures as a result of the Holocaust. Unlike the SSI payments, which are designed to provide basic necessities, the German payments are designed to make the recipients whole. Excluding Blackfeet and Gros Ventre payments from income for SSI eligibility demonstrates

Congress's acknowledgment that inclusion would frustrate the payments' restitutionary purpose. And the SSA's exclusion of the Alaskan native payments can only be explained as an attempt to effectuate congressional intent to provide for reparation. If exclusion is necessary to effectuate the purposes of the Blackfeet, Gros Ventre, and Alaskan native payments, it follows that exclusion is also necessary to avoid frustrating the purpose of the German reparations payments.

Second, Congress has expressed no desire to interfere with the German government's attempt to make amends for crimes committed during the Holocaust. Instead, Congress has established a Memorial Council to commemorate Days of Remembrance and to erect a permanent living museum on behalf of the victims. Moreover, Congress has agreed not to subject the German reparations payments to Federal income taxation. We think that these congressional actions reflect a desire to effectuate fully the German government's restitutionary intent in making reparations payments. For these reasons, the doctrine of comity supports interpretation of the SSI provisions to exclude German reparations payments from income in determining SSI eligibility.

### CONCLUSION

In sum, even though Congress has not spoken directly on the matter, we conclude that Congress's historical concern for Holocaust victims and Congress's and the SSA's treatment of analogous payments, when considered in conjunction with principles of international comity, indicate a congressional intent to exclude German reparations payments from income in determining SSI eligibility.

This case requires us to resolve a conflict between the Government's interest in allocating a limited pool of funds to support the country's aged, blind, and disabled, and the Government's interest in restoring a semblance of normal existence to Holocaust survivors who are part of our society. In resolving the matter in favor of the latter, we follow the lead of Congress.

Having recognized the great suffering of people like Felicia Grunfeder, and having consistently taken steps to ameliorate their plight, Congress could not have intended to undermine its own longstanding policy favoring their welfare by counting German reparations payments as income in determining eligibility for SSI benefits.

Today's decision is in harmony with Congress's desire to provide some solace to the victims of one of human history's terrible tragedies.

The district court's judgment is VACATED and REMANDED for further proceedings consistent with this opinion.

SCHROEDER, ALARCON, FERGUSON, BOOCHEVER and REINHARDT, Circuit Judges, concurring.

NELSON, Circuit Judge, concurring with the exception of Section C.

FERGUSON, Circuit Judge, concurring; SCHROEDER and ALARCON, Circuit Judges, joining.

Although concurring in the court's well reasoned opinion, I arrive at the same result by analyzing the issue in a different manner. This analysis does not depend on the status of the recipient but instead rests on the status of the funds received. Tort compensation traditionally has been excluded from the definition of income and, unless Congress specifically states otherwise, the Social Security Act (the "Act"), 42 U.S.C. §§ 1381-1383c, should not be construed as modifying this longstanding definition. Because the reparations payments at issue here are in the nature of tort compensation, Rev.Rul. 57-505, 1957-2 C.B. 50 (such payments are "in the nature of reimbursement for the deprivation of civil or personal rights"); Rev.Rul. 56-518, 1956-2 C.B. 25 (German reparation payments are paid on account of "suffered damage to life, body, health, liberty, rights of property ownership, or to professional or economic advancement"), they neither constitute "income" under the income tax laws; Rev.Rul. 71-477, 1971-2 C.B. 479; Rev.Rul. 58-500, 1958-2 C.B. 21; Rev.Rul.

57-505, 1957-2 C.B. 50; Rev.Rul. 56-518, 1956-2 C.B. 25, nor under the Act for purposes of determining eligibility for supplementary security income ("SSI").

Despite the broad definition accorded to the term "gross income" under the tax laws, *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 429-32, 75 S.Ct. 473, 475-77, 99 L.Ed. 483 (1955); I.R.C. § 61(a), payments received in the nature of tort compensation have never been considered income. See *Commissioner v. Glenshaw Glass Co.*, 348 U.S. at 432 n. 8, 75 S.Ct. at 477 n. 8; *Roemer v. Commissioner*, 716 F.2d 693, 696 (9th Cir.1983). Congress has explicitly excluded personal injury recoveries from the definition of income since 1918. Revenue Act of 1918, Ch. 18, § 213(b)(2), 40 Stat. 1057 (1919). Today such recoveries are excluded from income under section 104(a)(2) of the Internal Revenue Code. 26 U.S.C. § 104(a)(2).

To be eligible for SSI benefits under the Act, an individual must be aged, blind, or disabled with an income not exceeding a meager \$1,752 per year and resources no greater than \$1,500 (unmarried) or \$2,250 (married). 42 U.S.C. § 1382(a)(1). An individual's annual income consists of both his or her earned and unearned income as defined in section 1382a of the Act. 42 U.S.C. § 1382a. In section 1382a(2), Congress defines "unearned income" as all income other than earned income and sets forth a nonexhaustive list of specific items constituting unearned income. Tort compensation is not included in that list. When it omitted such compensation from the list, Congress did so with the knowledge that historically personal injury recoveries have always been excluded from the definition of income. Had Congress wished to alter this longstanding definition it would have so stated. See 2A C.D. Sands, *Statutes and Statutory Construction* § 47.30 (1973) (legislature is presumed to have given legal terms in a statute the same meaning as that given to them in the jurisprudence of this country absent a manifested intent to the contrary). This is further underscored by the fact that Congress deemed it neces-



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sary to expressly list items such as gifts, inheritances, prizes and awards, workmen's compensation payments, and life insurance proceeds which are either fully or partially excluded from income under the income tax laws, so that, contrary to the usual tax treatment, the entire amount of such items would be included in the calculation of income for SSI purposes. 42 U.S.C. § 1382a(2)(A), (B), (C), (D), (E), (F). This explicit inclusion of items exempted or partially exempted from income under the income tax laws evidences Congress' intention not to include tort damages within the definition of income for purposes of SSI eligibility.

The rationale underlying the exclusion of compensation paid for personal injuries from gross income under the income tax laws, 26 U.S.C. § 104(a)(2), is that such compensation makes the victim "whole from a previous loss of personal rights—because, in effect, [it] restore[s] a loss to capital." *Starrels v. Commissioner*, 304 F.2d 574, 576 (9th Cir.1962). See also *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 432 n. 8, 75 S.Ct. 473, 477 n. 8, 99 L.Ed. 483 (1955) (referring to the long history of Internal Revenue Service rulings holding personal injury recoveries nontaxable on the theory that they correspond to a return of capital); *Roemer v. Commissioner*, 716 F.2d 693 (9th Cir.1983) (entire lump-sum recovery of damages in a defamation action is excludable from gross income as damages received "on account of personal injuries" and the award should not be differentiated as includable or excludable on the basis of whether the amount recovered was in consideration of damage to plaintiff's personal life or his professional career). This understanding has led the Commissioner of Internal Revenue to interpret liberally the statute excluding such recoveries from income so as to include both punitive damages and all compensatory damages (whether for pain and suffering or loss of employment) where there has been a personal injury. Rev.Rul. 75-45, 1975-1 C.B. 47. See also *Roemer v. Commissioner*, 716 F.2d at 700. This same rationale applies to the calculation of in-

come for determining eligibility for SSI. When money is received as compensation for wrongful loss there is no economic gain or accession to wealth but only an attempt to restore the recipient to the position he occupied prior to the loss. The recipient is perhaps made whole, but not enriched. *Starrels*, 304 F.2d at 576.

When determining whether a SSI applicant's income exceeds \$1,752 the rationale discussed above with respect to tax laws requires exclusion of tort compensation from this calculation. For example, the person with one arm and a tort recovery for the loss of his other arm is no better off than he was with two arms and no tort recovery. See *Starrels v. Commissioner*, 304 F.2d at 576; *Hawkins v. Commissioner*, 6 B.T.A. 1023, 1025 (1927) ("Such compensation . . . adds nothing to the individual . . . . It is an attempt to make the plaintiff whole as before the injury.").

Even though the Secretary of the Department of Health and Human Services (the "Secretary") defines "income" as "anything you receive in cash or in kind that you can use to meet your needs for food, clothing, or shelter," 20 C.F.R. § 416.1102, the Secretary has not treated "income" as including all monetary receipts. The Secretary has excluded payments made for land claims under the Alaska Native Claims Act from the calculation of income for SSI purposes since 1974, despite the fact that Congress only expressly exempted such payments from income tax, 43 U.S.C. § 1620(a), and not from the definition of income for purposes of SSI eligibility. 1975 U.S.Code Cong. & Ad.News 2389. See 20 C.F.R. § 416.1124(b), App. IV(a) (regulations under the Act exempting such payments from income for SSI purposes). The purpose of the Alaska Native Claims Act is "to provide an equitable solution to the [land] claims made by the Natives of Alaska through a combination grant of land and money," 1971 U.S.Code Cong. & Ad.News 2193. When the Secretary excluded the benefits received by the Alaska Natives, she clearly understood the traditional rule that payments received in the

nature of tort compensation have never been considered income. The payments received by Mrs. Grunfeder in this case are of the same nature as those received by the Alaska Natives. The only difference is the status of the recipients. This underscores the reason why I would decide this case not on the status of the recipient but upon the status of the funds which are received.

Because the traditional exclusion of tort recoveries from the definition of "income" continues under the Act, payments received in the nature of tort compensation, such as the ones involved here, are to be disregarded in calculating an individual's income for purposes of determining eligibility for SSI. Basing our decision on this analysis would also exclude from the definition of income for SSI purposes payments such as those received by former prisoners of war and internees under the War Claims Act of 1948, 50 U.S.C.App. §§ 2001-2017; see Rev.Rul. 56-462, 1956-2 C.B. 20 (payments to former prisoners of war captured and held during the hostilities in Korea as compensation for the loss of their personal rights are not includable in the gross income of the recipients for federal income tax purposes); Rev.Rul. 55-132, 1955-1 C.B. 213 (payments authorized by War Claims Act to former prisoners of war are in the nature of reimbursement for loss of personal rights and are not includable in the gross income of the recipient); those made to victims of criminal acts as restitution for the pecuniary losses they suffer as a direct result of those acts, see Cal.Gov't Code §§ 13959-13974; and any payments made to satisfy the claims of those who suffered hardship as a result of Executive Order 9066, 7 Fed.Reg. 1407 (Feb. 19, 1942), which caused the relocation and internment of persons of Japanese ancestry as well as citizens of the Aleutian and Pribilof Islands. See American-Japanese Evacuation Claims Act, 50 U.S.C.App. §§ 1981-87; *Japanese American Evacuation Redress, 1983: Hearings on S.1520 Before the Subcomm. on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 98th Cong., 1st Sess. (1983); Commission on Wartime

Relocation and Internment of Civilians, *Personal Justice Denied* (1982); 1980 U.S. Code Cong. & Ad.News 2405-06.

The definition of income does not depend on the status of the recipient but on the nature of the payment received. Tort compensation has traditionally been excluded from the definition of income and, unless Congress specifically states otherwise, the Act should not be construed as modifying this longstanding definition. Thus, because tort recoveries are not "income," the reparation payments at issue here, which are in the nature of tort compensation, are not "income" for the purposes of determining eligibility for SSI.

GOODWIN, Circuit Judge, dissenting; WALLACE, J. BLAINE ANDERSON and CANBY, Circuit Judges, joining:

The majority's exposition of what the Congress might have intended if the question had been before it is probably as accurate as that sort of speculation ever can be. The original panel that decided this case, however, was dealing with the law as it was, and not as it might have been had the Congress been better advised. I would not have taken the case en banc, and would adhere to the original panel decision. See *Grunfeder v. Heckler*, 708 F.2d 458 (9th Cir.1983).

The SSI program is a need-based program. An individual is eligible for SSI benefits if that person's income and resources fall below certain statutory figures. Grunfeder's resources do not fall below those figures. Having recognized these considerations, the majority looks to a number of statutes in which Congress did express an intent that certain benefits not be counted as unearned income to decide that Congress intended *sub silentio* the same result here. The original panel took the same statutory examples to reveal that Congress knows how to make policy exceptions of this kind when it chooses to do so. Much of what the majority has to say about the equities in this case can hardly be disputed. Indeed, Congress would no doubt lend a willing ear.



The analogies which the majority draws to lump sum awards, however, do not apply to a need-based statutory scheme of the kind presently before us. While not mentioned by the majority, Grunfeder received the various lump sum awards to which she was entitled, and they have not been counted against her. I believe the original panel made the correct analysis of the law to apply to this case for the reasons carefully stated in its opinion. The tragic history of Germany between 1935 and 1945 sheds no light on the narrow question before us.

I respectfully dissent.



**ABEX CORPORATION,**  
**Plaintiff-Appellee,**

**v.**

**SKI'S ENTERPRISES, INC., et**  
**al. Defendants,**

**and**

**UNITED STATES of America,**  
**Defendant-Appellant,**

**v.**

**Walton SHIM and Sandra Shim,**  
**Defendants-Appellees.**

**No. 84-1787.**

**United States Court of Appeals,**  
**Ninth Circuit.**

**Argued and Submitted Nov. 7, 1984.**

**Decided Nov. 27, 1984.**

Government appealed from decision of the United States District Court for the District of Hawaii, Martin Pence, J., awarding attorney fees to private parties in an interpleader action. The Court of Appeals, Tang, Circuit Judge, held that: (1) Government's appeal was timely and presented strictly legal issue which could be raised on

appeal even though it was not raised below, and (2) Equal Access to Justice Act did not authorize award of attorney fees out of interpleader fund before satisfaction of preexisting federal tax liens.

Reversed.

#### **1. Interpleader ⇐34**

A particular claim in an interpleader action is not appealable until all claims to the fund are adjudicated. Fed.Rules Civ. Proc.Rule 54(b), 28 U.S.C.A.

#### **2. Interpleader ⇐34**

Sixty-day time period for filing of notice of appeal in interpleader action ran from date judgment was entered rather than from dates orders were entered granting stakeholder and another attorney fees to be paid from the interpleader fund and, thus, Government's appeal was timely. Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

#### **3. Federal Courts ⇐611**

Application of general rule that Court of Appeals should not consider arguments that appellant failed to raise below is discretionary.

#### **4. Federal Courts ⇐611**

Court of Appeals may dispense with rule relating to waiver of issues not raised below when the question is a purely legal one that is both central to the case and important to the public.

#### **5. Interpleader ⇐34**

Strictly legal issue as to whether the Equal Access to Justice Act abrogated priority of outstanding tax liens to allow an award of fees to an interpleader plaintiff would be considered on appeal even though it had not been raised below. 28 U.S.C.A. § 2412.

#### **6. Interpleader ⇐35**

Generally, courts have discretion to award attorney fees to a disinterested stakeholder in an interpleader action.

#### **7. United States ⇐147**

The Equal Access to Justice Act did not authorize award of attorney fees to

Mr. TOWNS. Let me thank both of you for your testimony. I think your point is that consistency is important. I am still thinking about the elderly, being in their seventies and their eighties and all of a sudden not sure as to what is going to happen. I just think that the uncertainty is something that we should move to correct right away.

The other thing is the fact that the agencies have discretion. I think that becomes dangerous because if you do not have the right administrator that has the kind of sensitivity to understand, then nothing will happen. So I think the legislation brings about consistency regardless of who is heading the agency. The direction will be there from the Congress.

Mr. FEUER. That is right.

Mr. TOWNS. So thank both of you. And I really would like to at some point hear more about those cases and the legal maze you went through.

Mr. FEUER. Be glad to do that.

Mr. TOWNS. Not today, but I would like to hear about that. I can imagine what you went through in order to be able to make it possible for your clients to be able to avail themselves of the services.

Let me yield at this time to Congressman Portman.

Mr. PORTMAN. Thank you for your testimony. I am interested in the cases as well. It seems as though the 1984 decision applies narrowly to Social Security. Did you then consider bringing other cases to expand it to other agencies such as HUD and perhaps other examples?

Mr. FEUER. As most legal services programs, Bet Tzedek takes our clients as we find them. So in that case we had a client with an SSI problem. She brought the matter to our attention and we brought her claim to the courts. We have not had the opportunity with respect to other Federal need-based programs to do the same.

I will say that with respect to Medicaid in California, called Medi-Cal, Bet Tzedek worked with the State legislature and there is now in California a complete exclusion for Holocaust restitution in calculating eligibility for Medi-Cal, and we have worked with another organization on the Austrian case, to which I referred in my testimony.

So we have not had the opportunity, however, to address this problem once and for all until Congressman Waxman introduced this legislation, and we feel very strongly that this is a much more efficient means of addressing the problem than having to expend valuable resources litigating case after case. It makes no sense. It exacerbates the anxiety we have all discussed and this is just much more efficient.

Mr. KAGAN. If I may just supplement. The Grunfeder case, with which we had some assistance with Bet Tzedek to some extent with the whole history of it, took years and it went through a Federal court of first instance and then had to go to the ninth circuit. No. 2 is the Austrian case, because the Grunfeder case dealt with German reparations, then suddenly an Austrian case also happened to have come up in California in San Francisco, no, in Los Angeles, and Bet Tzedek Legal Services and we ourselves, under a committee for Jewish claims in Austria, which is part of the committees

with which we directly lead, had to test out the same issue with respect to Austrian compensation.

So I can assure you, every time a new case arises and if you have to fight it out case by case, it is lengthy, it is onerous, it is difficult, it is trying for the individuals, as you can imagine. You can imagine the position of Ms. Grunfeder when she was turned down in the court of first instance until it came up on appeal, et cetera. So I don't have to elaborate. I think the situation is clear.

Mr. PORTMAN. As an attorney, I can say that the court system in this country in some instances like this might lead, in fact, to some individual cases being unfairly resolved and inconsistencies and really lack of efficiency both on the side of legal costs but also on the side of the Federal Government. And I don't know if you have any comments about that, but it would seem to me there might be some efficiency gained simply by standardization that may be hidden in the system now.

Mr. FEUER. Exactly.

Mr. PORTMAN. One other question briefly. If either of you could give us now or perhaps submit for the record, I think it might be useful, cases in addition to Social Security where this problem has arisen, and again this is something that might be useful for the record as we begin to move forward on this issue.

We heard from HUD earlier this morning. I was not able to be present, but I read the testimony briefly and it appears HUD now has an internal policy whereby at least for low-income housing reparation payments are not deemed to be considered. But are there other instances you might be able to describe for us?

Mr. FEUER. Do you want to go ahead?

Mr. KAGAN. Please.

Mr. FEUER. Let me share, as we mentioned, SSI has unilaterally implemented this rule nationally where the ninth circuit ruling would only require it to do so within the ninth circuit, but it is an informal rule in place in the Social Security Administration.

For Medicaid purposes, there was a bill passed in 1990 which made it clear that nursing home residents ought not have their Holocaust restitution counted in determining eligibility for Medicaid as a Federal matter.

As I mentioned, in California that is not an issue for all Medi-Cal recipients.

There are, however as far as we are aware, no cases involving, say, food stamps or AFDC as two examples where this issue might have arisen. But we may not be cognizant of all such matters. I am not sure if that is a complete answer to your question but that is the best I can do.

Mr. PORTMAN. Thank you. Yield back, Mr. Chairman.

Mr. TOWNS. Thank you very much. Congress Waxman.

Mr. WAXMAN. Thank you, Mr. Chairman. I want to thank both witnesses for their testimony, particularly Mr. Feuer for coming from Los Angeles and my district to be here today. He pioneered the case in the ninth circuit, the Grunfeder case, and after having gone through that litigation, was instrumental in suggesting that we ought to adopt a uniform policy here at the Federal level not to allow any program that is directed to people who are in financial need to have to go through the lengthy litigation and uncertainty



as to whether those benefits that are due them might not be there because of reparation payments as a result of having survived the Holocaust.

Mr. Kagan, I did not know until you mentioned it that this is the anniversary of Krstel Nacht. Krstel Nacht was an occasion that marked the beginning of the activities in Nazi Germany in clamping down on the Jews and then eventually attempting to wipe them out.

I think there is a symbolism in our, at this point, having the Congress of the United States, with all the problems that this country faces, domestically and internationally, have a committee of this Congress consider this issue, because we are committed as a nation to uphold morality and to look after the injustices that are done to people and especially those in this country.

And I want to commend you, Mr. Chairman, and just acknowledge the fact that while we did not intend to have this meeting on this particular day, we are the country that predominated after World War II. We survived the cold war. We stand for as a beacon to the world of democracy, of human rights, concern for humanity. We struggle constantly to try to live up to those standards, and in the case of these handful of people that are left that suffered so greatly, accepting this testimony and I presume as well that we will move legislation to protect them as we deal with all the other issues that challenge us to live up to our standards. Thank you both.

Mr. TOWNS. Thank you very much, Congressman Waxman.

Congressman Payne.

Mr. PAYNE. Yes, thank you.

As I indicated, I appreciate your testimony and as I indicated, we are glad that HUD under the section 8 program did change because, as you know, section 8 takes 30 percent of the income and bases the rentals and section 202 housing is an income-based program.

I just have a question. Do you have any idea or an estimate of how many Holocaust survivors fall into this category? How many people does this apply to?

Mr. KAGAN. We are really, to some extent, in no position to have specific numbers, other than I can tell you from really from 40 years of experience of working with Holocaust survivors who have filed claims and so on, as has been said before by the representatives of the American Gathering, the majority, I would say the vast majority, of the survivors were fortunate enough and strong enough and I would say courageous enough humanly to have been able to build a life for themselves and an existence for themselves after this terrible tragedy and after they had found haven in this country, and are not seeking other SSI or section 8 grants or assistance.

So that without my being able to put numbers on it, I ask you to accept my deeply felt judgment and conviction that it is a small segment of the survivor population that falls in the category of individuals who are likely to seek need-based Federal assistance.

This is the best that I can tell you, because neither Germany does not keep particular records by country of origin or residence of the claimants, nor certainly do the agencies of the United States Government, as far as I know, keep any overall calculations. But

I am sure that in the context of the totality of beneficiaries of SSI or the totality of recipients of section 8 or other housing assistance, the Holocaust survivor component is de minimis. That is my best judgment and conviction.

Mr. PAYNE. Thank you. Thank you, Mr. Chairman.

Mr. TOWNS. And also the number of survivors is going down every day.

Mr. KAGAN. Exactly. As I said before, this is a finite and self-diminishing group of individuals. There is no—within not that many years, there will not be too many witnesses left, and that is the great work that the Holocaust Memorial Museum is performing, what the American Gathering is performing, and what the teaching program of the American Gathering is performing, and that is to keep that memory alive.

I don't want to digress to other things; that for an individual, for all of us involved in what has happened during the Nazi regime, to open newspapers and read ethnic cleansing stories are horrors or killing fields of Cambodia are horrors that we fought when General Eisenhower opened camps, that that would never in human history occur again in whatever form or any resemblance of it tragically. And, unfortunately, that is not the case and, therefore, the memory of that and the lessons of this unique tragedy have to be kept alive, and I trust that that legislation, when passed, will also in some way express the recognition and the awareness of our Nation, through Congress, of the very special moral issue that underlies and underpins this entire matter.

Thank you, Mr. Chairman.

Mr. TOWNS. Thank you.

Mr. PAYNE. Mr. Chairman, let me just comment. I could not agree with you more, and I would hope that the leadership of this country and the world will continue to remember what occurred in the 1930's when people looked the other way, because it appears that in this great Nation of ours we have once again started to look the other way. We are saying that certain countries, certain regions of this world, the loss of one U.S. life is not worth the saving of hundreds of thousands of other people. And so I fear that there is an insidious growth of isolationism in this country.

There is the issue that we have looked the other way in Bosnia as another winter approaches. And to say that we should leave it to the Europeans and the Europeans will discuss it and another winter will pass by, and the increasing isolationism and lack of concern and compassion and commitment in this country, I think, is a very sad and dangerous trend which in fact may come back to haunt this great Nation at some point in the future.

Mr. TOWNS. Well, let me thank you again for your testimony, and I want to thank all the witnesses for their testimony today. Your stories are very moving and also your comments are very informative. I am certain that we will think of you as we deliberate.

I also want to commend my colleague from California, Congressman Waxman, who introduced this legislation. I think it is very timely legislation, and as I listened to my colleague, Congressman Payne, I think that we are definitely moving in the right direction, and I think that the timing could not be better. Just do it and as quickly as possible.



So let me thank you again for your testimony. This hearing has been adjourned and the record will be open for 5 days.  
[Whereupon, at 12:20 p.m., the subcommittee was adjourned.]



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